(30,201)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 891

MISSOURI PACIFIC RAILROAD COMPANY, PETITIONER,

vs.

REYNOLDS-DAVIS GROCERY COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 20, 1924

[fol. 1] [Caption omitted.]

[fol. 2] **CIRCUIT COURT OF SEBASTIAN COUNTY**

Comes now the appellant and prays an appeal to the Supreme Court.

Vincent M. Miles, Thos. B. Pryor, Attorneys for Appellant.

Appeal granted March 12, 1923.

W. P. Sadler, Clerk, by J. H. Campbell, D. C.

[fol. 3] IN SEBASTIAN CIRCUIT COURT, FORT SMITH DISTRICT

REYNOLDS-DAVIS GROCERY COMPANY, Plaintiff,

vs.

MISSOURI PACIFIC RAILROAD COMPANY, Defendant

COMPLAINT AT LAW—Filed May 11, 1921

Comes the plaintiff, Reynolds-Davis Grocery Company, and for its cause of action against defendant, Missouri Pacific Railroad Company, states:

That plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Arkansas, with its principal place of business at Fort Smith, Arkansas.

That defendant is a corporation organized and existing under and by virtue of the laws of the State of Missouri; that it is a common carrier and owns and maintains and operates a line of railroad in the Fort Smith District of Sebastian County, Arkansas.

That on or about the 9th day of April, 1920, the —— Railroad Company, for a valuable consideration, accepted from Bishop C. Perkins & Company, Raceland, Louisiana, 500 sacks of sugar consigned to plaintiff and to be transported over its own and connecting lines of railway to Fort Smith, Arkansas, and there delivered to plaintiff; that said sugar was shipped in car CC & O 8109 under seal numbered R-660771-L-660772; that said car was delivered to [fol. 4] and received by the defendant as the last connecting carrier on or about the 26 day of April, 1920, and was delivered by it to plaintiff at Fort Smith, Arkansas, on the 27th day of Apr., 1920.

That upon the delivery of said car by defendant to plaintiff on said date, said shipment was short 60 sacks of sugar; that 60 sacks of sugar were lost through the negligence of defendant and its connecting carriers; that defendant negligently failed to deliver said 60 sacks of sugar to plaintiff and has failed to account to plaintiff for the same; that said 60 sacks of sugar weighed 6,000 pounds and was of the value of $975.00.

In addition to the aforesaid 60 sacks of sugar which were wholly missing or lost from said car at the time of its delivery to plaintiff, three sacks were in a torn and mutilated condition, resulting in a complete loss of 106 pounds of sugar; that said loss was the result of the negligent handling of said shipment by the defendant and its connecting carriers; that said 106 pounds of sugar was of the value of $17.22.

That in order to secure the delivery of the said shipment of sugar from defendant, the plaintiff was required to pay freight and war tax on 500 sacks of sugar; that plaintiff paid freight charges and war charges on 6106 pounds in excess of the weight of goods to it delivered; that such excess freight payment amounted to the sum of $53.53; that the excess war tax payment amounted to $ .91.

Wherefore, plaintiff prays judgment against defendant in the [fol. 5] sum of $1,026.66, and for costs of this action.

Daily & Woods, Attorneys for Plaintiff.

STATE OF ARKANSAS,
County of Sebastian, ss:

I, R. S. Robertson, being first duly sworn, states upon oath that he is President of the Reynolds-Davis Grocery Company, plaintiff herein, a corporation; that the facts set out in the above and foregoing complaint are true.

R. S. Robertson.

Subscribed and sworn to before me this 27th day of Apr., 1921. Lawrence Keating, Notary Public. My commission expires 4/8/22. (Seal.)

[File endorsement omitted.]

(Summons issued 11th day of May, 1921, and returned duly served on the 11th day of May, 1921.)

[fol. 6] Record Entry

OCTOBER TERM, 1921, OCTOBER 27, 1921

[Title omitted]

JUDGMENT ON DEFAULT

Now on this day this cause being called for trial, comes the plaintiff and by its attorneys, Daily & Woods, and the defendant comes not for trial although said cause was regularly set for trial on this day. Now, therefore, this cause is submitted to the Court sitting as a jury, upon the pleadings and the testimony introduced on behalf of plaintiff. It appears therefrom that defendant is justly indebted

to plaintiff in the sum of $1,023.66 as shown by said complaint, and all of said sum is now justly due and no part has been paid.

It is therefore considered, ordered and adjudged by the Court that the plaintiff do have and recover of and from the said defendant, Missouri Pacific Railroad Company, the said sum of $1,023.66, together with all of its costs in this behalf laid out and expended, for which execution may issue.

[fol. 7] IN THE SEBASTIAN CIRCUIT COURT, FORT SMITH DISTRICT

[Title omitted]

MOTION TO SET ASIDE DEFAULT JUDGMENT—Filed October 27, 1921

Comes now the defendant, Missouri Pacific Railroad Company by its attorneys, Pryor & Miles, and moves the court to set aside the default judgment rendered in the above cause on this day, October 27th, and as grounds therefor states that the case was set for trial at Nine A. M. on this date; that the attorney for the defendant, Vincent M. Miles, arranged to be on hand with his witnesses at Nine o'clock, but that his watch was twenty minutes slow and he did not reach the court room until ten minutes past Nine; that between Nine and Nine-ten the coyrt had empaneled the jury and had called upon the plaintiff's counsel to state his case; that if plaintiff's counsel had been permitted to state the case, defendant's counsel, Vincent M. Miles, would have been present in time to have proceeded with the case, but that the Court stopped the plaintiff's counsel from a statement of the case, withdrew the case from the jury and entered judgment against the defendant; that within five minutes from the time this was done defendant's counsel appeared in court and asked the court to set the judgment aside and proceed with the trial. This the court refused to do. That the defendant has a meritorious defense [fol. 8] to the cause of action of plaintiff, and therefore prays the court to set aside said default of judgment and grant its trial.

Pryor & Miles, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 9] Record Entry

OCTOBER TEBM, 1921, OCTOBER 27, 1921

[Title omitted]

ORDER GRANTING MOTION TO SET ASIDE DEFAULT JUDGMENT

This day comes defendant and files motion to set aside the default judgment this day entered in this cause, and said motion now coming

on to be heard, the plaintiff consenting that said judgment may be set aside, the Court, being well and sufficiently advised in the premises, doth grant said motion, on condition that defendant pay all costs to date; and upon compliance with this condition, the cause will stand reinstated.

[fol. 10] IN THE SEBASTIAN CIRCUIT COURT, FORT SMITH DISTRICT

[Title omitted]

ANSWER—Filed June 4, 1921

Comes the defendant, Missouri Pacific Railroad Company, and for answer to the complaint herein, denies that on or about the 9th day of April, 1920, or at any other time, the —— Railroad Company, for a valuable consideration, accepted from Bishop C. Perkins & Company, Raceland, Louisiana, 500 sacks of sugar consigned to plaintiff, to be transported over its own and connecting lines or railway to Fort Smith, Arkansas, and there delivered to plaintiff; denies that said sugar was shipped in car C. C. & O. 8109 under seal number R-660772; denies that said car was delivered to and received by defendant as the last connecting carrier, on or about the 26th day of April, 1920; denies that said car was delivered by defendant to plaintiff at Fort Smith, Arkansas, on the 27th day of April, 1920, or at any other time.

Defendant denies that upon delivery of said car to plaintiff on said date, said shipment was short 60 sacks of sugar; denies that 60 sacks of sugar were lost through any negligence of defendant or its connecting carriers; denies that defendant negligently failed to de-[fol. 11] liver said 60 sacks of sugar to plaintiff, or has failed to account to plaintiff for the same; denies that said 60 sacks of sugar weighed 6,000 pounds, and denies that it was of the value of $975.00, or any other sum.

Further answering defendant denies that in addition to the 60 sacks of sugar alleged to have been wholly missing or lost from said car at the time of its delivery to plaintiff, that three sacks were in a torn and mutilated condition, resulting in a complete loss of 106 pounds of sugar; denies that said loss was the result of any negligent handling of said shipment by the defendant or its connecting carriers; denies that said 106 pounds of sugar was of the value of $17.32, or any other sum.

Defendant denies that in order to secure the delivery of the said shipment of sugar from defendant, the plaintiff was required to pay freight and war tax on 500 sacks of sugar; denies that plaintiff paid freight charges and war charges on 6,106 pounds in excess of the weight of goods delivered to it; denies that such excess freight payment amounted to the sum of $33.53, or any other sum; denies that the excess war tax payment amounted to $.91, or any other sum.

Defendant denies that plaintiff is entitled to recover the sum of $1,026.66, or any other amount, against it.

Wherefore, having fully answered, defendant prays that it be discharged hence with all its costs in this behalf laid out and expended.

Vincent M. Miles, Attorney for Defendant.

[File endorsement omitted.]

[fol. 12] OCTOBER TERM, 1922, OCTOBER 24TH, 1922

[Title omitted]

RECORD ENTRY

Now on this day, this cause coming on to be heard, comes plaintiff by its attorneys, Daily & Woods, and comes defendant by its attorneys, Pryor & Miles, and both parties announcing ready for trial, comes a jury of twelve good and lawful men who were regularly selected, empaneled and sworn to try this cause, namely: Arthur H. Morrow and eleven others. After hearing a part of the evidence, the hour of adjournment having arrived, the jury were by the Court permitted to separate until tomorrow morning at convention of court, under proper and usual instructions.

OCTOBER TERM, 1922, OCTOBER 25TH, 1922

[Title omitted]

VERDICT AND JUDGMENT

Come the parties hereto as on yesterday and by their respective [fol. 13] attorneys, and comes the jury heretofore empaneled to try this cause, and said trial progressed. After hearing the remainder of the evidence, the instructions of the Court and the argument of counsel, the jury retired to consider of its verdict, and afterwards, on the same day, returned into open Court here its verdict as follows, to-wit:

"We, the jury, find for the plaintiff in amount sued for, to-wit: $992.22, & interest from April 21, 1920.

Arthur H. Morrow, Foreman."

It is therefore considered, ordered and adjudged by the Court that the plaintiff, Reynolds-Davis Grocery Company, do have and recover of and from the defendant, Missouri Pacific Railroad Company, the sum of Nine Hundred Ninety two & 22/100 ($992.22) Dollars, together with all of its costs herein laid out and expended, for all of which execution may issue.

(For motion for new trial, see page 96 this transcript.)

OCTOBER TERM, 1922, OCTOBER 30, 1922

[Title omitted]

MINUTE ENTRY

This day comes defendant and, by permission of the Court, files its motion for a new trial herein, and said motion now coming on to be heard, the parties appear by their respective attorneys. The Court, after hearing argument of counsel, being well and sufficiently [fol. 14] advised in the premises, doth overrule said motion, to which action of the Court in overruling said motion for a new trial, the defendant at the time excepted, and prayed an appeal to the Supreme Court of the State of Arkansas, which is granted, and defendant is given 90 days in which to prepare and file its bill of exceptions.

OCTOBER TERM, 1922, DECEMBER 28, 1922

[Title omitted]

Record Entry

ORDER EXTENDING TIME

The time allowed for filing bill of exceptions herein is extended to 130 days, because of the inability of the Stenographer to prepare record within the time previously allowed.

[fol. 15] IN THE SEBASTIAN CIRCUIT COURT FOR THE FORT SMITH DISTRICT

[Title omitted]

Bill of Exceptions

On this day, October 24, 1922, the above entitled cause coming on for trial, before the Hon. John Brizzolara, Judge presiding, came the plaintiff, by its attorneys, Daily & Woods, and came the defendant, by its attorneys, Vincent M. Miles, and the parties announcing ready for trial, a good and lawful jury was empaneled, and sworn, to try the issues joined.

Thereupon, the plaintiff, in order to maintain the issues upon its party, introduced the following testimony, to-wit:

PLAINTIFF'S TESTIMONY

P. W. FURRY, a witness for the plaintiff, being sworn, testified as follows:

Q. State your name?
A. P. W. Furry.
Q. What is your occupation?
A. Station agent for the Frisco Railroad Company?
Q. What are your general duties as such agent?
[fol. 16] A. General supervision of freight matters, handling freight.
Q. In Fort Smith?
A. Yes, sir.
Q. Do you keep a seal record of the cars which are received by you from the Missouri Pacific Railroad?
A. Yes, but we don't always get the seal on every car, but we have a record we keep as much so as we can.
Q. I will ask you if your road delivered car No. 8109, C. B. & Q., loaded with sugar, on or about the 21st day of April, 1920, to the Reynolds-Davis Grocery Co.?
A. Yes—C. C. & O. 8109.
Q. Yes, sir.
A. Yes, our records show that was delivered to Reynolds-Davis Grocery Company on the 20th of April, 1920.
Q. Have you a record of the seals of that car?
A. We have not.
Q. Can you explain why you have not?
A. Our office seal book naturally would have that in it, but our records from about the 15th of April, to the last of April were destroyed, and we have to record since that.
Q. I will ask you if Seal R-660771-L660772 are Frisco seals?
A. I would not think so; I cannot say for sure. Of course those numbers might possibly be Frisco seals, but I would say the name would be on the seal if they were.
Q. I will ask you if seal AK 2371 was a Frisco seal?
[fol. 17] A. Yes, that is our Fort Smith Seal.
Q. Can you say if that seal was on this car you say you delivered to Reynolds-Davis Grocery Company?
A. I cannot say.; AK is our seal.
Q. In this instance you do not know how that seal got on that car?
A. No, sir; I cannot tell you.
Q. Nor who put it on?
A. No, sir. That seal A. K. 2371 was a seal assigned to what we call the front office at our office, in care of the car clerk. Seals AK 2300 to 2399, were assigned to that desk sometime before April of that year.
Q. What desk?
A. To the car clerk's desk in the front office.
Q. In your office?

A. Yes, sir.
Q. And not in the yard office?
A. No, sir.
Q. Was your yard office keeping seal records at that time?
A. They could have been; I don't know that they were.
Q. Was this car delivered under the original bill of lading issued on the car?
A. I don't know anything about the bill of lading, of course, on the cars in city service we simply delivered the car according to instructions given us by the agent of the line delivering it to us.
Q. By whom?
[fol. 18] A. This car came from the Missouri Pacific; when we switched it for them they paid us for it.
Q. They paid you for it?
A. Yes, sir.
Q. Is that a switching contract you have with them?
A. It is a switching arrangement.
Q. Was that switching by you under orders from the Missouri Pacific Railroad Company?
A. Yes, sir.
Q. How did that order come in this instance?
A. They gave us the order over the telephone, and the daily car report carries that information with it, carries that car with that information; and a switching order is given over the telephone.
Q. Where did you pick up this car from the Missouri Pacific Railroad?
A. At the connection.
Q. Where is the connection?
A. At the north end of the yard, north of the round house.
Q. That is a switch between your road and the Missouri Pacific Railroad?
A. Yes, sir.
Q. Did your road have anything to do with the collection of the freight on this shipment?
A. No, sir.
Q. Have anything to do with the collection of the switching?
A. The Missouri Pacific paid us for the switching.

[fol. 19] Cross-examination:

Q. You state that you were the agent of the Frisco Railroad here at that time?
A. Yes, sir.
Q. The Missouri Pacific Railroad Company has not any track by which it can deliver a shipment to the Reynolds-Davis Grocery Company?
A. No, sir.
Q. The Frisco Railroad Company is the only railroad company in Fort Smith that can deliver a car load shipment to the Reynolds-Davis Grocery Company?
A. That is it.

Q. And to the various other concerns in Fort Smith, the only railroad along Garrison Avenue—the lower end?

A. That is the only railroad that has a track up in the alley to Reynolds-Davis Grocery Company, Echols and Company and these other concerns.

Q. As I understand you, any car load shipments coming to Fort Smith, to Reynolds-Davis Grocery Company, over the Missouri Pacific Railroad, the Kansas City Southern Railroad, and all other railroads, they pay you a switching charge to the Frisco to handle that car to their place of business, and place the car?

A. Yes, sir.

Q. What is that charge per car?

A. At the present time, it is $6.30, car loads was, I think at that time it was only two dollars, interstate.

[fol. 20] Q. If the rate now in effect was in effect at that time, you received $6.30 for moving that car from the Missouri Pacific connection and switching it to the place of business of the Reynolds-Davis Grocery Company with your regular switch engine?

A. Yes, sir.

Q. Switching interstate freight?

A. Yes, sir.

Q. Switching rate for this switching is fixed by the Interstate Commerce Commission?

A. It is carried in the interstate commerce tariff.

Q. The rate for thsi switching is carried in the interstate commerce tariff?

A. Yes, sir.

Q. That rate that the Frisco got for switching this car in there?

A. Yes, sir.

Q. When they put it on the connection you check the seals or have some one to?

A. That is the practice, yes, sir.

Q. When the Missouri Pacific turns it over to your road and you receipt for it, the Missouri Pacific's responsibility for it ceases then, does it not?

A. Yes, I suppose it does.

Mr. Woods: We object to that.

The Court: That is a conclusion of law.

Objection sustained; and the defendant saved an exception.

Mr. Miles:

[fol. 21] Q. Tell the jury whether or not the Frisco takes charge of it when it switches the car on its connection?

A. Yes, sir.

Q. It moves it with its engine?

A. Yes, sir.

Q. And the Missouri Pacific has no further control over it from the time it is switched on the Frisco connection?

A. Yes, we get a round order; order it sent back to them.

Q. Before it is moved?

A. Before it is delivered, yes, sir.

Q. But they have no authority to give any direction as to how it is to be moved and delivered; they cannot send an engine in there?

A. No, sir.

Q. When it is on your track, they are not permitted to send any of their employees on your track without your consent?

A. No, sir.

Q. Has not the Frisco full charge of the shipment after it is set on your connection?

A. Yes, we have it in charge.

Q. Do you know who Mr. T. S. Walton is?

A. He used to be the freight claim agent of the Missouri Pacific Railroad.

[fol. 22] Q. I hand you letter he addressed to you asking you to give him the seals on this car when received from the Missouri Pacific, I will ask you if that is the letter and your reply in pencil at the bottom?

A. This reply, I think, was made by a clerk in my office.

Q. Is not that your signature?

A. That is my name but that is not my signature; I did not put it on there; it looks like Lee Waters' writing; he was the man that handles papers of that kind.

Q. He was authorized to sign your name to that sort of statement?

A. Yes, sir.

Q. What does it say?

Mr. Woods: I objected to that evidence; I do it before it is offered, and I object to any questions being asked this witness relative thereto, because, at most, it is but a self-serving declaration, and the notation made thereon was made by some one else besides the witness.

The Court: If it is a record, the agent that made the record is the proper party to prove it by.

Mr. Miles: We offer it on this ground, that the witness testifies that it was made there in his office and that the person that signed his name was authorized to do so.

Witness: I think he has orders to write it; I am sure of it. As a matter of fact, I sign very few papers that come thru my office personally.

The Court: This is not his name and you will have to bring the man here that signed it.

Mr. Miles: The one that actually signed it?

The Court: Yes, sir.

[fol. 23] Mr. Miles: We except to the ruling of the court and offer the testimony of this witness to prove this on the ground that this witness testifies that this is the handwriting of one of the clerks in his office and that he was authorized to handle this matter for him.

The exceptions of the defendant were noted here by the court.

Mr. Miles:

Q. Who is the man that wrote this?
A. I think it is Lee Waters.
Q. Is he a witness in the trial.
A. No, sir.
Q. Is he in the city?
A. He is in the city.

Mr. Miles: I ask for a subpœna for this witness.
Subpœna ordered.

Mr. Miles:

Q. Is this your signature (presenting paper)?
A. No, sir; that is not my signature; that is my name but that is a letter written by one of the clerks in my office.
Q. What clerk wrote that one?
A. J. H. Templeton.
Q. Is it the custom in your office to have clerks in your office sign letters with your signature to transact the business?
A. Yes, sir.
Q. And when they do sign them it is the business being transacted in your name?
[fol. 24] A. Yes, sir.

The Court: The court holds that that makes no difference; you will have to bring the party here that signed the letter, or made the record.
Mr. Miles: That is not a record it is a positive statement of the witness as to a fact.

Objection overruled by the court on the ground that this would be hearsay of this witness; and the defendant saved an exception.

Mr. Miles:

Q. Do you know when this car was turned over to the Frisco—what date?
A. I looked at the record and found that it was turned over to us the 19th of April, 1920.

Mr. Woods:

Q. That is the date you were notified it was there?
A. That is the date we were given switching orders. As a matter of fact it might have been put on sometime during the night of April 20th.
Q. You have no way of knowing just when it was placed on the connection.
A. No, sir. I only know when I was notified it was there.

Letter referred to was offered in evidence by defendant, excluded by the Court upon the objections of the plaintiff, and defendant excepted, is as follows: Marked Ex. to P. W. Furry's testimony. Also same letter offered in connection with the testimony of Leo [fol. 25] Waters, as Ex. I, excluded again by the Court over the exceptions of defendant.

EX. A AND EX. I

Missouri Pacific Railroad Company

Freight Claim Department

Claim No. M 14671-18, Foreign

St. Louis, Mo., 12/31, 1920.

Mr. P. W. Furry, Frisco Ry., Ft. Smith, Ark.

DEAR SIR: Please note sections marked "X" and be governed accordingly. When replying use separate sheet, giving details in full. From Raceland, La. To Ft. Smith, Ark.

Bill Lading Issued by —— R. R. Date: —— —, ——.

Consignor: —— ——. Consignee: S. O. Mty. R. D. Co.

Articles cl: 500 Bags Sugar.

Name of Carrier: —— —— Billed from: —— —— Billed to: —— ——. Way Bill: M. T. L. C. Date: 4/9. Car Initial: —. Number: C. C. O., 8109.

1. Attach complete copy billing.
2. Attach complete copy transfer.
3. Attach copy bill of lading.
4. Advise what car received in and forwarded, where carded and what exceptions if any noted.
5. Furnish Seal record in and out on all doors and hatches.
6. Are you still short? If not, attach copy delivery receipt in duplicate.

[fol. 26] 7. If still short or if exceptions noted prior to or after delivery attach copy your O. S. D. report.

8. Advise date of, and train received and forwarded explaining all delays fully.

9. Was consignee notified of arrival? If not, why? If so, when and in what manner? Attach copy of all notices.

10. Advise condition of car when set for loading or when received and delivered, attaching copy inspector's report.

11. If shipment on hand, why? If disposed, how, and on whose authority? Furnish reference to your disposition request and my reconsignment number. If reshipped attach copy your way bill.

12. Authorize for $— as per statement attached.

13. Our proportion is less than voucher.

14. Charge us $—. Rule —. All papers pinned together to accompany your debit.

15. Sell to best advantage, advising. If unable to sell forward to

me at St. Louis, D. H., sending me copy your billing. Show claim number and in-bound way bill reference on out billing.

(In pencil here:)

"Your file 19-352 4/20/20 Covers 5 & 7 Pls. car to your line 4/16/20.

Seal record sure.

Yours truly, T. S. Walton, Freight Claim Agent.

[fol. 27] (The answer to above letter is by pencil notation at the lower left-hand corner of sheet of paper upon which letter was written, with an arrow mark drawn from the name of T. S. Walton to beginning of answer notation as follows:)

"Seals on car when rec'd from M. O. P. Conn. were 660771 and 660772.

P. W. Furry."

There is a stamp in the face of said letter as follows: "Missouri Pacific Ry., O. R. & W. Division. Jan. 8, 1921. St. Louis, Mo. Freight Claim Department."

Also: "St. L. S. F. R. R. Received Mail Desk Jan. 3, 1921. Local Freight Office, Ft. Smith, Ark."

[fol. 28] J. F. FOSTER, a witness for the plaintiff, being sworn, testified as follows:

Q. What is your name?

A. J. F. Foster.

Q. What do you do?

A. I am chief yard clerk for the Frisco.

Q. In Fort Smith?

A. Yes, sir.

Q. Were you chief clerk of the yard along about the 20th or 21st of April, 1920?

A. Yes, sir.

Q. How long have you been yard clerk there?

A. Between four and five years.

Q. What are your general duties as yard clerk?

A. To handle the correspondence and make reports, etc.

Q. Reports on what?

A. On everything pertaining to the routine work.

Q. Does that include reports on cars which have been handled by your office by the yards?

A. Yes, on cars.

Q. Does that include reports on cars that have been switched off of other roads?

A. No, sir. Reports of that character are handled from the office.

Q. In April 1920 were reports of that character handled by your office?

A. No, sir.

[fol. 29] Q. Have they ever been handled there?

A. No, sir.

Q. Have you ever kept the seal records in your office of cars switched off the Missouri Pacific Railroad to other roads?

A. No, sir; we have not kept the seal records of connections. They are kept by Mr. Furry's office.

Q. Did you formerly keep these seal records at your office?

A. We have never kept the seal records of cars switched to and from connections, no, sir.

Q. Your office has never kept those seals?

A. No, sir; unless it was a special record or somethings of the kind.

Q. Is it a part of the duty of your office to check cars on the connection?

A. It is now.

Q. How long has that been a part of your work?

A. Since the force was reduced in the latter part of 1920.

Q. Do you remember about what date in 1920?

A. No, I think it was in the latter part, along in the fall of 1920. We checked the Missouri Pacific connection last year.

Q. Prior to April, 1920 did you check the Missouri Pacific connections?

A. We did not; that was checked from the freight office.

Q. When did the freight office you speak of, when did it com-[fol. 30] mence keeping this check record of the Missouri Pacific connections?

A. They have for all times so far as I know; they have until last year 1921, and probably the latter part of 1920, they checked the connection and took the seal record of the connection.

Q. That is what date?

A. Latter part of 1920 and 1921, and at this time are; but prior to that that connection was checked from the freight office.

Q. During the month of April, 1920, your office kept no record of the seals of cars, which your office checked—did your office check cars to the Missouri Pacific connection?

A. No, sir.

Q. You never did prior to that time?

A. Not as I know of, unless it was specially done.

Q. Do you know anything about a car of sugar shipped to Reynolds-Davis Grocery Company, and delivered to that company on April 20 or 21, 1920, in car C. C. & O. 8109?

A. No, sir; I have no record of it.

Q. Have you any recollection of it?

A. No, sir; I have no recollection of it.

Q. Along about the month of April, 1920, did you have any knowledge, or do you have any knowledge of any car of sugar which sat on the Missouri Pacific Connection with the door open for a [fol. 31] day or two?

Defendant objected.

The Court: Unless you can show tha it is the same car it is not admissible.

Mr. Miles: He stated that he has no personal recollection as to this particular car.

The Court: It will be admitted for the present conditionally. If the proof shows they received a number of cars, the court will exclude it; if it is shown that this was the only car, the court will admit it. The court will admit it now subject to the further showing that there was only one car.

Defendant excepted to the ruling of the court.

Mr. Woods: Do you remember the question?

A. Yes. It must have been about that time. My impression is that there was a car of sugar which was reported to me that the door was open, and I gave the clerk who works with me instructions to seal this car. Whether he did or not I cannot say at this time.

Q. Where was this car?

A. It was on the Missouri Pacific connection, that is, reported to be on the Missouri Pacific connection at that time; I know it was a high class commodity; I am not sure it was sugar, but it is my impression that it was. I know it was a high class commodity.

Q. Do you know whether the car, at the time you put the seal on it, had actually been switched to the Frisco Railroad Company?

A. I don't know whether any interchange had been made or not, but delivery had in fact been made because it was on the con-
[fol. 32] nection property.

Q. Was there any other car of sugar, or car loaded with a high-class commodity in it, about that time reported to you in that condition?

A. I would not know about it except it had been reported.

Q. Was that the only car about that time that was reported to you in that condition that you put the seal on.

A. That was the only car, yes, sir.

Cross-examination:

Q. You did not see any car door open yourself?

A. I did not.

Q. It was reported that the door of a car was open and you told someone to go and put a seal on it?

A. Yes, sir.

Q. You know whether he sealed it or not?

A. No, sir.

Q. You don't know what was in the car?

A. I am not positive about that.

Q. You say it was on the connection. When the Missouri Pacific switches in cars that the Frisco deliveries to that connection, who takes charge of them and delivers them.

A. The Frisco.

Q. And the Frisco was supposed to keep a record of the seals of the cars?

A. Yes, now we are doing that. At that time my office was supposed to have kept the record.

[fol. 33] Q. Here is a statement seal or car when received from the Missouri Pacific connection with 660777-660772, signed P. W. Furry, are you the clerk of Mr. Furry that signed that?

A. No, sir.

Q. You are not the clerk that made that out?

A. I am not.

Q. You are not the man that — charge of checking the seals of cars turned over to the Frisco?

A. I am not. I stated that.

Mr. Wood:

Q. You stated in answer to Mr. Miles' question that when a car from the Missouri Pacific is placed upon the connection, that it belongs to the Frisco then; it does not belong to the Frisco until, after the interchange has been given?

A. It does not. I said I did not know when the interchange was given, because the interchange is kept at the front office, Mr. Furry's office.

Q. As a matter of fact a car might be placed on the connection and afterwards withdrawn by the Company unless they give interchange?

A. It is done of course.

[fol. 34] F. P. LYTTON, a witness for the plaintiff, being sworn, testified as follows:

Q. What is you name?

A. F. P. Lytton.

Q. What work are you engaged in?

A. Switchman for the Frisco.

Q. Where are you employed?

A. In the Frisco yards.

Q. How long have you been employed there?

A. Twenty years.

Q. Were you employed there in April, 1920?

A. Yes, sir.

Q. What are your duties as switchman for the Frisco Railroad Company?

A. Making up and breaking up trains coming in and different things, sometimes switching, and sometimes pull the connection.

Q. Does your work carry you over the Frisco yards down here?

A. Yes, all over the Frisco yards.

Q. Does that include the connection between the Frisco and the Missouri Pacific?

A. Sometimes I pull the connection, yes, sir.

Q. You sometimes pull the connection yourself?

A. Yes, sir.

Q. What do you mean by that?

[fol. 35] A. Taking cars that come to us from the Missouri Pacific that go out over the Frisco also over the Wholesale District.

Q. Do you remember on or about, or something near, the 20th of April, 1920, having seen a car of sugar standing on the Missouri Pacific connection with the door open?

A. Yes, sir.

Q. And some of the sacks of sugar torn?

A. I don't remember about whether they were torn or not.

Q. State what you saw?

A. The car of sugar was standing open, the door open; I noticed it going by two different times.

Q. Somewhere April the 20th, 1920?

A. In the spring, yes, sir; I cannot state what date.

Q. Is that the only car of sugar you saw in that condition along about that time?

A. The only one, yes, sir.

Q. From your observation of the car could you say that there were evidences of pilfering?

A. I cannot say; I did not go and examine the car closely. I just passed by within fifty feet of it.

Q. You do not know the number of the car?

A. No, sir.

Q. Or the seals?

A. No, sir.

Q. You do not know who it was for?

A. No, sir.

[fol. 36] Q. Do you know whether or not there had been a transfer given on that car from the Missouri Pacific to the Frisco?

A. I cannot say.

Q. At that time?

A. I cannot say.

Q. I mean interchange?

A. I do not know.

Cross-examination:

Q. This car was on the connection that the Missouri Pacific Railroad Company delivers cars to the Frisco?

A. Yes, sir.

Q. After they are delivered on that connection, the Frisco pulls them and delivers them to the various places of delivery?

A. Yes, after we get transfers.

Q. Do you say that the door was wide open?

A. I cannot say whether it was as far as it could be shoved; you could see the sacks of sugar.

Q. Do you know the exact date of that?

A. No, sir; in the spring.

Q. How long did it stay on the connection?

A. As far as I remember I noticed it two days.

Q. After the Missouri Pacific brought it up there and set it in

on the Frisco connection, it remained there for two days before the Frisco pulled it off?

[fol. 37] A. Yes, sir.

Q. You do not know anything about the seals when the Missouri switched it in on the connection?

A. No, sir.

Mr. Woods:

Q. Do you think the car was there for two full days or did you see it two different times?

A. I saw it twice going by there; might have been there just part of two days.

[fol. 38] ROY HEATHERINGTON, a witness for the plaintiff, being sworn, testified as follows:

Q. What is your name?

A. Roy Heatherington.

Q. What do you do?

A. I am a switchman for the Frisco.

Q. Where do you live?

A. Fort Smith.

Q. Are you engaged as a switchman for the Frisco in Fort Smith?

A. Yes, sir.

Q. What are you duties?

A. My duty at present is with the leading engine, switch engine.

Q. In the Frisco yards?

A. Yes, sir.

Q. Were you engaged in that work in April, 1920?

A. Yes, sir; I was working for the Frisco in the Frisco yards; and I had charge of the city engine.

Q. In April, 1920?

A. Yes, sir.

Q. What were your general duties in charge of the city engine?

A. I did all the wholesale work.

Q. What do you mean?

A. I spotted all the cars delivered to the wholesale places in the alleys; and did team track work.

[fol. 39] Q. Where did you pick up or receive these cars?

A. According to what road, we would get them from the Missouri Pacific or the Kansas City Southern connection, would get the biggest part of them off of the connections.

Q. Did you keep a record of the cars you delivered when you had charge of the switch engine?

A. Yes, sir.

Q. Have you got that record with you?

A. Yes, sir.

Q. Have you a record of a car delivered to the Reynolds-Davis Grocery Company, loaded with sugar, on the 20 or about the 20th of April, 1920?

A. Yes, sir.
Q. Will you produce that record for us?
A. Yes, sir. (Producing book).
Q. Was that record made by you at the time?
A. Yes, sir.
Q. What does that record show?
A. Car 8109 C. C. & O., sugar for Reynolds-Davis, switched at 2 P. M.
Q. Does it give the seals?
A. No, sir; just the car number and who it went to, and contents.
Q. Do you remember what the seals were on that car?
A. No, sir; I did not take the seals at that time.
Q. That was not a part of your duty?
A. No, sir.
[fol. 40] Q. Do you know anything about the condition of the car and the condition of the contents of it when you delivered it?
A. No, sir; I do not; the car was sealed up when I delivered it.
Q. Don't know about the contents?
A. No, I do not know about the contents at all.
Q. About this date, do you recall having seen a car standing down on the Missouri Pacific connection, a car of sugar, with the door open and some of the sacks down in the door showing evidence of having been molested.
A. Along about that time.
Q. What did you see?

Objected to by defendant.
Objection overruled.
Defendant saved an exception.

A. About that time I saw a car of sugar there with the door on the east side open, but whether it was molested or not I cannot swear.
Q. Did you ever hear or know or see any other car of sugar which was on that connection in that condition about that time?
A. No, sir.
Q. Or anywhere near that time?
A. No, sir.
Q. At the time you saw this car standing on the connection there, [fol. 41] do you know whether there had been any transfer or interchange of the car to the Frisco from the Missouri Pacific?
A. The first time I saw it I did not have a transfer on it then.
Q. Did you get a transfer on it later?
A. Later, yes, sir.
Q. Was it sealed up when you got your transfer on it?
A. Yes, sir.
Q. Do you recall where that particular car was delivered?
A. You mean did I pull it off?
Q. Yes, the particular car you saw standing open?
A. No, I don't know where it went to.

Cross-examination:

Q. You don't know whether it was delivered to Reynolds-Davis or not?

A. No, sir.

Q. You just saw a car of sugar standing open?

A. Yes, sir.

Q. How many cars of sugar was delivered to Reynolds-Davis in April that year?

A. Everybody was getting sugar then.

Q. On that date did you have any other car of sugar in your train?

A. No, sir.

Q. You say during the month of April a great many other cars of sugar were delivered to the various wholesale houses there?

[fol. 42] A. Yes, sir.

Q. And delivered like that generally?

A. Yes, sir.

Q. You speak of the Missouri Pacific connection, that connection is a track between the Missouri Pacific and the Frisco?

A. Yes, sir.

Q. It is put in by the two railroads for the Missouri Pacific to deliver cars to the Frisco?

A. Yes, sir.

Q. The Frisco signs a receipt for these cars and picks them up and handles them?

A. Yes, sir.

Q. And the Frisco notes the seals of te car at the time they are turned over to it ordinarily?

A. Not at that time; the yard clerk generally checks the connection overy morning and gets the seals.

Q. Then if the car was setting there in the afternoon, the yard clerk would check the connection the next morning and get the seals of the car before it would be pulled out?

A. Yes, sir.

Q. The Frisco would then get the yard clerk's record and would have a check of the seals?

A. Yes, sir.

Q. When was the interchange made?

A. They generally give us the interchange about 8 or 9 o'clock in the morning.

[fol. 43] Q. About the time the yard clerk checks them?

A. Yes, sir.

Mr. Miles: We renew our objection to this class of testimony.

The Court: Objection overruled and exceptions saved.

Mr. Woods:

Q. Is this the only claim you know anything about for shortage of sugar in the month of April or any since that time?

The Court: If he knows anything about it.
Mr. Miles: We object to that.
The Court: Objection overruled and exception saved.

Mr. Woods:

Q. Did you hear of any other claim for shortage of sugar?
A. No, sir.

Same objection; ruling and exception.

Q. You did hear of this claim right at the time?

Defendant objected.
Objection overruled.
Defendant excepted.

A. In the next day or two afterwards.
Q. You did not hear of any other claim from anybody else?

Defendant objected; objection overruled and defendant excepted.

A. No, sir.

[fol. 44] H. F. VALENTINE, a witness for the plaintiff, being sworn, testified as follows:

Q. What is your name?
A. H. F. Valentine.
Q. You are the same as Frank Valentine?
A. Yes, sir.
Q. What do you do?
A. Receiving clerk for the Reynolds-Davis Grocery Company.
Q. How long have you held that position?
A. Five or six years.
Q. Were you acting in that capacity in April, 1920?
A. Yes, sir.
Q. What are your duties as receiving clerk?
A. Checking inbound freight, car loads.
Q. Did you receive and check a car load of sugar received by Reynolds-Davis Grocery Company from Bishop C. Perkins and Company of New Orleans, La., or about the 20th of April, 1920?
A. Yes, sir.
Q. Have you a record of that shipment?
A. Yes, sir.
Q. Did you keep a record at that time?
A. Yes, sir.
Q. Have you that record with you?
A. Yes, sir.
[fol. 45] Q. Will you produce it?
A. Yes, sir. (Producing record.)
Q. State the date upon which that car of sugar was received?
A. Reported in on the morning of 4-19, and was given to the

Frisco on 4-20 and placed on the house on 4-20 that afternoon, I don't know the exact hour. At that time took the seals off the car and went in and saw it was in bad condition.

Q. Did you notice the seals of the car at that time?

A. Yes, sir.

Q. What were they?

A. Side door, one Frisco, 2371 on the other side is S. P. Lines 660772; the other seal is M. L. T. R. R. Led. W. 3.

Q. Where was the last seal?

A. The two last seals were on the door next to our house; the Frisco seal was on the car on the south side of the house.

Q. Did you personally unload the car?

A. I did not unload it but I checked it as it came out of the car, the load.

Q. You personally checked it?

A. Yes, sir.

Q. At what time was it unloaded?

A. On the 21st, finished on that morning at 8:20.

Q. Did you see the car before any of the contents were taken out?

[fol. 46] A. Yes, I took all the seals off myself.

Q. What was the appearance of the car and the contents on the inside, what was the appearance of the injury to the car when you opened the door?

A. When we opened the door the sugar was stacked in the car in the door way, from the door this way like this is the door and the ends stacked lengthwise in the door, and there was a big hole here, and looked like the sugar from the bottom come out at least in these holes; and when I saw the bad order of the car I notified the Missouri Pacific that it was bad order, and would like for them to come up and inspect it. The- came up the morning of the 21st, and inspected the car and asked us to unload it.

Q. Who came and who inspected it?

A. I think it was Mr. Johnson himself.

Q. What is this (presenting paper)?

A. That is an affidavit I make out showing the condition of the cars, bad orders in the cars; some of the railroad authorities sign these showing that they inspected the car and the damaged goods. This is what Mr. Johnson signed on the morning of the 21st.

Q. Mr. H. E. Johnson?

A. Yes, sir.

Q. Is that his signature?

A. Yes, sir.

Q. He was the inspector for the Missouri Pacific Railroad?

[fol. 47] A. He is the man that signed that.

Q. And the company by you signed that?

A. Yes, sir.

Mr. Woods: We desire to introduce this in evidence.

Mr. Miles: We object to it on the ground that the fact that the agent of the railroad company signed a statement made by this witness that he received it is not binding on the railroad company.

The Court: You will have to show his authority, what position he occupied with this railroad company.

Mr. Miles: He was Freight and Passenger Agent at Fort Smith.

Mr. Woods:

Q. Do you know what authority Mr. Johnson had for the Missouri Pacific Railroad Company?

A. No, sir.

Q. Did you call him and ask him to *mekt* the inspection?

A. Yes, sir. I called the Missouri Pacific and asked them to send a man to inspect the car.

Q. And in response to that call they sent Mr. H. E. Johnson to inspect it?

A. Yes, sir.

Q. And he made the inspection and signed this railroad report?

A. Yes, sir.

Q. And that is his signature?

A. Yes, sir.

The Court: The objection is overruled, and exceptions saved.

[fol. 48] Here the report referred to was introduced in evidence, marked Ex. C, and read to the jury as follows:

Ex. C

Damage Report

Date: 4-21-20.
Car No. C. C. & O. 8109.
Car Seals: Frisco R. R.
Side door 2371.
Side door S. P. Lines: End Door 660772; End Door M. L. T. R. R.; Top Led. W. 3.
From Bishop C. Perkins & Co., New Orleans, La.
Date of invoice: —— — ——. Railroad: Mo. P.
Receiving Sheet: B 5431. Case No. —. Weight: —.
Invoice Check: —. Description of article damaged or short: 3 Sk. Sugar Bad Order; 89# Sugar Short. Salvage: 17# Salvage Sugar.
Inspected by H. E. Johnson for Mo. Pac. Railroad.
(Signed) Frank Valentine."

Q. You say you checked it personally, what did you check it with-against?

A. Checked it against the articles from the invoice sheet.

Q. Does the sheet show the number of sacks that should have been in the car?

A. Yes, sir.

Q. How many does it show?

A. Five hundred sacks.

Q. How many did you find in the car?

A. Four hundred and forty.

Q. That is exclusive of the bad order sacks?

A. That is with the bad order sacks; 440 with three bad order sacks.

Q. At the time Mr. Johnson made this report, did you report that there were sixty sacks of sugar short?

[fol. 49] A. Yes, sir.

Q. What did he say?

A. He said he did not see it loaded and would not sign any affidavit or anything of being any short in the car.

Q. What prompted you to call Mr. Johnson to make an inspection of this car; was it this bad order sacks or 60 missing sacks?

A. I did not know how many sacks were missing at that time; the car was in such condition that it looked to me like it had been tampered with and that is the reason I called him to inspect the car and see it before we unloaded it.

Q. What was its condition?

A. A big hole right in front of the door and some more sacks had been loaded and fell in and some standing on the end and still the hole was not full.

Q. What do you mean by hole; do you mean that the sacks had been stacked up around and left a depression in the center?

A. Like this is the door way (illustrating), the sugar set lengthways this way in the car, and at the door way the sacks were this way; and there was a big hole here down to the floor, and some of the sugar loked like it had fallen in there and still the hole was not as full as this way.

Q. Did you ever see sugar loaded that way before?

A. Yes, but I did not see holes in there that way before.

[fol. 50] Q. How many sacks of sugar did you find in the car?

A. 440.

Cross-examination:

Q. You say the seal on the side of the car ne-t to the house of Reynolds-Davis house was Southern Pacific Lines?

A. Frisco A. K. 2371.

Q. What was the seal on the other side?

A. Southern Pacific Lines.

Q. S. P. Lines 660772?

A. Yes, sir.

Q. You do not know when the companion seal to that 660771 had been removed do you?

A. No, sir.

Q. You don't know whether it was after it was delivered to the Frisco by the Missouri Pacific or not?

A. No, sir.

Q. What is the number of the Southern Pacific Lines seal?

A. S. P. Lines 6660772.

Q. That Southern Pacific Seal on the other side had not been tampered with or removed?

A. No, sir; it was all right and not broken.

Q. You don't know whether Southern Pacific Seal No. 660771 had been on the other side or not?

A. No, sir.

[fol. 51] Q. But when you got there was a Frisco seal on it?

A. Yes, sir.

[fol. 52] FRED MOCK, a witness for the plaintiff, being sworn, testified as follows:

Q. What is your name?

A. Fred Mock.

Q. Where are you employed?

A. Reynolds-Davis Grocery Company.

Q. In what capacity?

A. Cashier.

Q. Were you in that position there in April, 1920?

A. Yes, sir.

Q. What are your general duties as cashier for that company?

A. Receiving the cash and paying for everything we buy.

Q. I hand you this instrument and ask you to identify it (presenting a paper).

A. That is a duplicate bill of lading.

Q. Issued by whom and to whom and when and what does it cover?

A. It covers a car of sugar from Bishop C. Perkins and Company, New Orleans, La. from Morgan's Louisiana and Texas Railroad and Steamship Company.

Q. Do you remember of seeing that bill of lading before?

A. Yes, sir.

Q. Have you seen that or the railroad's original of which this is a copy?

[fol. 53] A. I have seen both. That is we asked for it. We have to give the original to the railroad company, that is our copy.

Q. Did you handle the original bill of lading?

A. Yes, sir.

Q. Attached it to a draft from the bank and turned it over to the Missouri Pacific Railroad Company?

Q. Is this the draft you speak of (presenting paper).

A. Yes, sir.

Q. What is the amount of the draft?

A. $8,125.00.

Q. What did that cover?

A. To Bishop C. Perkins and Company for a car of sugar.

Q. The same car as covered by the bill of lading?

A. Yes, sir.

Q. Did you personally pay that draft?

A. Yes, sir.

Q. Identify this paper and state what it is?

A. That is the expense bill on the car of sugar paid to the Missouri Pacific Railroad Company, Missouri Pacific expense bill.

Q. Did you personally pay that to the Missouri Pacific Railroad Company?

A. Yes, sir.

Q. And delivered this original bill of lading to the Missouri Pacific Railroad Company?

A. Yes, sir.

[fol. 54] Q. How much freight did you pay?

A. $258.79.

Q. What is the amount of the draft?

A. $8,125.00.

Q. How much is that gross on how much sugar?

A. 500 bags of sugar, 100 pounds each.

Q. That is the car load of sugar delivered to Reynolds-Davis Grocery Company about April 20, 1920?

A. Yes, sir.

Q. Have you computed the total loss suffered by the Reynolds-Davis Grocery Company by reason of this bad order sugar and sixty sacks shortage?

A. Yes, sir.

Q. Will you please tell the jury what the loss consists of and how made up?

A. We paid sixteen dollars and a quarter for the sugar. Sixty sacks short, 6,000 pounds, at $16.25 per hundred is $975.00 for the 60 sacks; 106 pounds shortage would make $17.22; the freight on the shortage 60 sacks and 106 pounds would be $30.53, and the war tax on that would be 91 cents.

Mr. Miles: We object to that because they are not entitled to deduct the amount of freight if they recover for the shipment.

The Court: If you are entitled to recover for the loss you are not entitled to recover for the freight.

Mr. Woods: That is on the sugar not delivered.

The Court: If you recover for the market value of the sugar at [fol. 55] Fort Smith, you are not entitled to recover the freight, because you are supposed to pay the freight.

Mr. Woods: We except to the ruling of the court.

Q. Leave out the item you have calculated as freight and war tax, and whatever other incidental losses there were suffered, and state how much the loss would be?

A. $992.22.

Q. Your calculation was based on that?

A. At the actual loss, the price we paid.

Q. The invoice price?

A. Yes, sir.

Q. The price you actually paid for the goods?

A. Yes, sir.

Q. Do you know whether or not that was the market value of the sugar in Fort Smith at that time?

A. No, sir; it was not.

Q. Was the market value more or less than that?

Mr. Miles: We object to that.

Objection sustained by the court and plaintiff excepted.

Mr. Woods: I want to offer in evidence the Bill of Lading as Exhibit D; the Freight Bill as Exhibit E; and the draft identified as Exhibit F; and the shipper's invoice.

Q. What is this shipper's invoice?
A. Yes, sir.

Mr. Miles: We object to the shipper's invoice because it was made by some person not a witness on the stand and is not here.
The Court: Yes, that is not admissible.
[fol. 56] Mr. Woods: We offer to introduce shipper's invoice as Exhibit G. Excluded by the court and plaintiff excepted.
Mr. Woods: We introduce the calculation of the loss as Ex. H.

Cross-examination:

Q. You say this Exhibit D, is the original bill of lading upon which this shipment was made?
A. Yes, sir.
Q. Signed by Mr. E. A. Fisher, agent, at Matthews, La.?
A. Yes, sir.
Q. That is the contract under which this shipment of sugar was.
A. Yes, sir.
Q. Was not the original bill of lading, when you checked it out, sent back to you with your claim papers?
A. I think not. I think the Missouri Pacific has it.
Q. That is an exact copy of the bill of lading?
A. That is one of the copies; they make several copies.
Q. That is a carbon?
A. Yes; we turn the original over to get the car.

[fol. 57] Exhibit D, Memorandum Bill of Lading, introduced byplaintiff, is as follows:

PLAINTIFFS' EXHIBIT D

For use in connection with the Standard form of order bill of lading approved by the Interstate Commerce Commission by Order No. 787 of June 27, 1908

Morgan's Louisiana and Texas Railroad and Steamship Company

This memorandum is an acknowledgment that a bill of lading has been issued and is not the Original Bill of Lading — a copy or duplicate, covering the property named herein, and is issued solely for filing or record.

Shipper's No. 59-B. Agent's No. —.

Received, subject to the classifications and tariffs in effect on the date of the receipt by the carrier of the property described in the Original Bill of Lading at Mathews, La., April 7, 1920, from B. C. Perkins & Co., the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The surrender of the Original order of bill of lading properly indorsed shall be required before the delivery of the property. Inspection of property covered by the bill of lading will not be permitted unless provided by law or unless permission is indorsed on the original bill of lading or given in writing by the shipper.

The rate of freight from Mathews, La., to Ft. Smith, Ark., is in Cents per 100 Lbs.

If—times 1st	If 1st class	If 2d class	If 3d class	If 4th class	If 5th class	If A class	If B class	If C class	If D class	If E class	If commodity
.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....

(Mail Address—Not for purpose of Delivery.)
Consigned to Order of B. C. Perkins & Co.
Destination: Ft. Smith, State of Ark., County of ——.
Notify Reynolds-Davis & Co., at Ft. Smith, State of Ark., County of ——.
Route: M. L. & T. Alex., Mo. P. Car Initial: C. C. & O. Car No. 8109.

No. packages	Description of articles and special marks	Weight (subject to correction)	Class or rate	Check column
500	Bags Granulated Sugar	50250	.....	.....

Capacity 100,000
Weight 46,000
Seals R 660171
" L 72

Paper Lined

Ex. D. S. L. & C.

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $——————
to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per ——————
(The signature here acknowledges only the amount prepaid.)

Charges Advanced:
$——————

B. C. Perkins, Shipper.
Per W. Hoadley.

E. A. Fisher, Agent.
Per —— ——.

[fol. 58] Exhibit E, introduced in evidence by plaintiff, being a Freight Bill covering shipment in question, is as follows:

PLAINTIFFS' EXHIBIT E

Form 1151 FF3-Ft. Smith

United States Railroad Administration

Freight Bill

Fort Smith, Ark., Station, 4-20-20.

Freight Bill No. F-814.
Consignee: —— ——. Shippers: Order B. C. Perkins Co.
Destination: Ntfy. Reynolds-Davis Gro. Co.
Route: MLT., MLT., Alex., Mo. Pac.
(Point of origin to destination.)

To (Director General Railroads) (Missouri Pacific Railroad), Dr.,
for Charges on Articles Transported

Waybilled from Raceland, a/c Mathews, La.
Waybill Date and No.: 4-/9/20 Mt. 16.
Full name of shipper: B. C. Perkins.
Point and date of shipment: ——.
Connecting Line Reference: ——.
Previous way-bill reference: ——.
Original car and Initials and No.: Car Initial and No. 8109 CCO.

Number of packages, articles, and marks	Weight	Rate	Freight advances	Total
500 Bags Gran. Sugar.....	50,250	50	25,125	25,125
				754
Lafayette 90,900	46,600	443	.....	25,879

Total prepaid, ——, War Tax.

[fol. 59] (Ex. E Continued)

Received payment: ——

—— ——, Agent.

Total, ——.

(Star.) For use at junction points on freight subject to connecting line settlement. (For prepaid city shipments agents must write or stamp prepaid in total column and stamp date delivered of receipting bill.) See rules on back.

Rules (on Back)

1. This form must be prepared with typewriter, pen or indelible pencil, all information called for to be shown in full and in a clear and legible manner.

2. Weight, rate and charges, must be shown in detail for less car load shipments.

3. Demurrage, switching, icing or other miscellaneous charges not included in the rate for transportation must me stated in detail, and the points at which such charges accrued, shown.

4. When charges are assessed on track scale weights, gross, tare, and net weights on which charges are based and name of weighing station, must be shown.

5. The route over which the shipment moved from point of origin to destination, including the initials of each carrier and name of each connecting line junction point, must be shown.

6. Overcharges will be refunded only on presentation of original paid freight bills.

[fol. 60] 7. Original paid freight bills should accompany claims for overcharges, loss or damage.

8. All freight will be subject to demurrage or storage charges, or both, as provided in published tariffs."

(NOTE.)—In the face of Exhibit A above is the following stamp: "Mo. Pac. R. R. Co.—Ft. Smith, Ark. Local Freight Office. PAID Apr. 27, 1920. H. E. Johnson, Agent. —— ——, Cashier. War Tax, —."

[fol. 61] Exhibit F, introduced in evidence by plaintiff, to testimony of Fred Mock, is as follows:

PLAINTIFF'S EXHIBIT F

Bishop C. Perkins

New Orleans, La., April 17th, 1920.

On demand pay to the order of Whitney-Central National Bank $8,125.00 Eight Thousand one hundred twenty five and 00/100 Dollars. Value received and charge the same to account of

(Signed) Bishop C. Perkins.

To Reynolds-Davis & Co., Fort Smith, Ark.

Endorsed on face: "Paid 4-12-20. First National Bank, Fort Smith, Ark."

Endorsed on back: "Pay and Bank, Banker, or Trust Company (or order). All previous Endorsements guaranteed. Apr. 9, 1920. Whitney-Central National Bank. New Orleans, La. E. H. Keep, Cashier.

[fol. 62] Exhibit G, to the testimony of Fred Mock, offered by plaintiff, and excluded by the court, to which action of the court the plaintiff excepted, is as follows:

PLAINTIFF'S EXHIBIT G

United States Food Administration License No. G-10109

No. 3569. New Orleans, La., April 7th, 1920.

M. Reynolds, Davis & Co., Fort Smith, Ark., Bought of Bishop C. Perkins & Co., Sugar, Molasses, and Rice, 203 N. Peters Street

All claims must be made five days after receipt of goods. Not responsible for goods after delivery to transportation company.
Terms: Cash.
Shipped per M. L. & T. c/o M. P. at Alexandria, La.
Payable in New Orleans with New York or New Orleans exchange.
500 Bags Fine Granulated Sugar, 50,000#, 16-¼, $8,125.00.
Car C. C. & O. #8109.
In Pencil: Pd. 4/12/20, Dft. 1st Nat. Bank. Page B5431. Railroad Mo. P. Recd. 4-21. F. O. B. There. Freight $258.79."

[fol. 63] Exhibit H to the testimony of Fred Mock introduced by plaintiff, is as follows:

PLAINTIFF'S EXHIBIT H

Reynolds-Davis Grocery Company

Fort Smith, Ark., May 7th, 1920.

Claim Missouri Pacific Railway Co.
Overcharge: ——. Los- Sugar: ——. Our No. 1238.
Station: Raceland, La. Damage Sugar. Your No. M14671.
Car No. 8109 C. C. O. W. B. No. M. T. 16. 4-9-20. E. B. No. F814. 4-20-20.
B. L. issued by M. L. & T. Ry. Date of B. L. 4-7-20.
From Bishop C. Perkins & Co., New Orleans, La., to Reynolds Davis Grocery Co., Ft. Smith, Ark.
Copy invoice attached.

Quantity bill lading	Expense bill	Weight	Price	
60 Sacks Sugar	(Short)	6,000	16.25	975.00
106# Sugar		106	.....	17.22
				992.22
	Freight	6,106	50	30.63
	Tax		.....	91
				1,023.66

Salvage returned to Carrier. See original invoice attached. Car placed with foreign seals on one side.

I hereby certify the above to be a true copy and correct copy of original charge submitted to Missouri Pacific Railway with our original claim.

S. H. Bagley."

[fol. 64] B. D. CRANE, a witness for the plaintiff, being duly sworn, testified as follows:

Q. What is you name?
A. B. D. Crane.
Q. What connection have you with the Reynolds-Davis Grocery Company?
A. Buyer and Secretary.
Q. Did you purchase this car of sugar in suit from Bishop C. Perkins & Co.?
A. Yes, sir. In the latter part of January, 1920, I contracted with Bishop C. Perkins for several cars of sugar at 16-¼ cent per pound in New Orleans. There was a very great delay in the shipment involving several months. There was a mad scramble on the part of the people to get sugar. He promised to make me shipments in a few days, and made the first shipment on the contract something like the middle of April. The sugar had been ordered three months. In the mean time sugar began to go up in value from 16.25 to anything a man saw fit to ask for it; and then it was quoted at 27.72, that is what was asked for it; and it would cost more to replace it. Our attorneys know better than I do, but in my opinion, as a business man, if we lose that freight or if the Railroad Company does [fol. 65] not pay that freight, we will have paid freight on something we never got. Suppose the entire car had been lost, and we had paid the freight on the entire car, the railroad company certainly ought to pay us for the entire car and the entire expense bill because we would be out the freight. If we had gotten the sugar we could have sold it for 27.22 to any party in the United States.
Q. Do you know the market price of sugar, what the sugar would have cost you. Do you know what the market price of sugar was in Fort Smith, that is what the sugar cost you in Fort Smith on April 20, 1920?

Mr. Miles: We agree that what Mr. Mock said was true.
Mr. Woods: You agree that we are not suing for more than the market value of the sugar in Fort Smith.
Mr. Miles: Yes, sir.
Mr. Crane: My notation says the change was made April 17th, we amended our prices on sugar to 27.72 in Fort Smith; it would have cost us 26.72 on that day, we would have made our replacement value by selling the sugar that day; if we had sold the sugar at 27.72 we would have made a dollar on it.

Cross-examination:

Q. You say you had to make a special trip to get these people to live up to their contract?

A. No; they were not trying to avoid it; they were trying to execute the contract. They were late; they were not able to ship; these people were brokers and went into the refining business; they saw on opening to get into the sugar business and could not [fol. 66] supply the demand; and I went to hurry them up.

Mr. Woods:

Q. You were engaged during all this period in the early part of 1920, in buying sugar, and during this time you say there was a mad scramble to get sugar—you were engaged in buying sugar all that time?

A. I was engaged in a mad effort to do it.

Q. During that time do you know whether or not there were a good many cars of sugar robbed?

A. Verry current.

The Court: That is excluded, unless he knows of his own knowledge.

Witness: I do not know of my own knowledge, just common report.

The Court: And at this point the statement of the brakemen or switchmen that they heard of no other car being broken into will be excluded, because that would be hearsay.

Mr. Woods: The plaintiff excepts to the ruling of the Court.

[fol. 67] Here counsel for the plaintiff read to the jury the deposition of O. J. SOMMERS, which is as follows:

Int. 1. Please state you name, age, occupation and place of residence?

A. O. J. Sommers; 51 years old; General Supt., Mathews, La.

Int. 2. By whom are you employed and how long have you been so employed?

A. By C. S. Mathews. 36 years.

Int. 3. By whom were you employed in April, 1920, and what were your general duties?

A. By C. S. Mathews; Supt., of loading and shipping of sugar and molasses, etc.

Int. 4. State whether or not on or about April 9, 1920, you loaded a car of sugar on the order of Bishop C. Perkins & Company of New Orleans, Louisiana, to be shipped to Reynold-Davis Grocery Company, of Fort Smith, Arkansas. If so, please state (a) The point (town and State) at which the car was loaded. (b) The kind or quality of the sugar. (c) How many sacks or containers. (d) The size or weight of each sack or container?

A. On April 7, 1920; Order of B. C. Perkins & Co., shipped to Reynolds-Davis & Co., Ft. Smith, Ark., (a) Mathews, La. (b) Granulated sugar. (c) 500 Bags. (d) 100 lbs. each.

[fol. 68] Int. 5. If you answer to inter-ogatory 5 that you loaded the car inquired about, please state whether or not you personally superintended the loading, and also state whether or not you personally checked and counted the sacks or containers?

A. Personally superintended the loading, checking and counting the sacks.

Int. 6. State if you know what was the condition of this shipment of sugar when it left the point of loading?

A. First class condition.

Int. 7. State if you know the number or other description of the car in which sugar was shipped?

A. Car initials C. C. & O. #8109.

Int. 8. State if you know the kind and descriptive numbers of the seals that were applied to the car; also state who applied seals and how much time intervened between the counting or checking of the sacks or containers of sugar by you and the application of the seals?

A. Seal numbers Right 660771. Left 660772. Personally applied the seals; immediately applied seals after counting and checking.

Int. 9. State anything else you know relative to the loading, counting, checking and shipping of this sugar, and the sealing of the car?

A. All car windows and doors were tarred paper sealed on the outside.

[fol. 69] Cross-interrogatories:

Cross. Int. 1. If you state that you counted 500 sacks of sugar in this car, aoso state how long it was between the time you counted the sacks of sugar and the time the agent of the Railway Company issued you a bill of lading?

A. Railway Company issued bill of lading covering this car about 6 or 7 hours after counting of the bags.

Cross. Int. 2. Was this car weighed at Mathews, La., and if so, by whom?

A. No.

Thereupon the plaintiff rested its case.

[fol. 70] Thereupon, the defendant, to maintain the issues upon its part, introduced the following testimony, to-wit:

DEFENDANT'S TESTIMONY

LEO WATERS, a witness for the defendant, being sworn, testified as follows:

Q. State your name?
A. Leo Waters.
Q. Do you work for the Frisco in the office of Mr. Furry?
A. Yes, sir.
Q. Mr. Furry stated that he did not sign a paper here but that his name to it was signed by Mr. Leo Waters a clerk in his office. Is this the paper that you wrote out there in your hand writing and signed?
A. Yes, sir.
Q. At that time what position were you holding there?
A. I had the position of bill clerk and looked after correspondence and got that from the permanent records of the Frisco.

Mr. Miles: We offer this in evidence as Ex. I.
Mr. Woods: Is this your hand writing?

A. Yes, sir.
[fol. 71] Q. Did you sign that yourself?
A. Yes, sir.
Q. Is that from your personal investigation?
A. Yes, sir.

Mr. Woods: We object to that. That is a communication from the Missouri Pacific in the nature of a self-serving declaration, and his answer does not state the record at all. If he remembers about the facts he can testify to it; but to identify this as the record, I do not think it is proper.
The Court: He may refresh his memory from that and state to the jury the facts.

Defendant excepted to the action of the court in refusing to admit the paper itself.

Q. Refer to that and state what the seals on the car were at the time the car was delivered to the Frisco?
A. It looks like 660771 and 660772 seals.

Mr. Woods:

Q. Did you see the seals on the car?
A. No, sir; all I have is the record.
Q. This statement you made is from a record somebody else made?
A. Yes, sir; the record we have there in the office.

Mr. Miles:

Q. The record made by some Frisco employee?
A. Yes, sir.

Q. You were there in the office?
A. Yes, sir.
Q. Who was the man, if you know?
A. I cannot tell you now.
[fol. 72] Q. Some man that checks the seals for the Frisco made that record?
A. Yes, sir.

Mr. Woods:

Q. You don't know where the information came from from that record?
A. I know it like the other records.
Q. You don't know whether it came over the telephone from the Missouri Pacific?
A. I cannot say as to that.

Mr. Miles:

Q. You testify that this is from the records made by the Frisco and that the Missouri Pacific had nothing to do with it?
A. I know the Missouri Pacific did not, no, sir.
Q. Did Mr. Templeton himself go out in the yards and do any work there?
A. I cannot tell you.

For Exhibit I to the testimony of Leo Waters, see next page 47-A.

[fol. 73] Letter referred to was offered in evidence by defendant, excluded by the court upon the objections of the plaintiff, and defendant excepted, is as follows: Marked Ex. to P. W. Furry's Testimony.

Also same letter offered in connection with the testimony of Leo Waters, as Ex. I, excluded again by the court over the exceptions of defendant.

EX. A AND EX. I

Missouri Pacific Railroad Company,

Freight Claim Department

Claim No. M 14671-18. Foreign —.

St. Louis, Mo., 12/31, 1920.

Mr. P. W. Furry, Frisco Ry., Fort Smith, Ark.

DEAR SIR:

Please note sections marked "X" and be governed accordingly.
When replying use separate sheet, giving details in full.
From Raceland, La., to Ft. Smith, Ark.

Bill Lading Issued by —— R. R. Date: —— —, ——.
Consignor: —— ——. Consignee: S. O. Mty. R. D. Co.
Articles Cl. 500 Bags Sugar.
Name of Carrier: —— ——. Billed from: ——. Billed to: ——. Way Bill: M. T. L. C. Date: 4/9. Car Initial —. Number: C. C. O. 8109.

1. Attach complete copy billing.

2. Attach complete copy transfer.

3. Attach copy bill of lading.

[fol. 74] 4. Advise what car received in and forwarded, where carded and what exceptions if any noted.

5. Furnish seal record in and out on all doors and hatches.

6. Are you still short? If not, attach copy delivery receipt in duplicate.

7. If still short or if exceptions noted prior to or after delivery attach copy your O. S. D. report.

8. Advise date of, and train received and forwarded explaining all delays.

9. Was consignee notified of arrival? if not why? If so, when and in what manner? Attach copy of all notices.

10. Advise condition of car when set for loading or when received and delivered, attaching copy inspector's report.

11. If shipment on hand, why? If disposed, how, and on whose authority? Furnish reference to your disposition request and my reconsignment number. If reshipped attach copy your way bill.

12. Authorize for $— as per statement attached.

13. Our proportion is less than voucher.

14. Charge us $—. Rule —. All papers pinned together to accompany your debit.

15. Sell to best advantage, advising. If unable to sell forward to me at St. Louis D. H., sending me copy your billing. Show claim [fol. 75] number and in-bound way bill reference on out billing.

(In pencil here:) "Your file 19-352, 4/20/20, Covers 5 & 7 Pls. car to your line 4/16/20.
Seal record sure.
Yours truly, T. S. Walton, Freight Claim Agent.

(The answer to above letter is by pencil notation at the lower left-hand corner of sheet of paper upon which letter was written, with an arrow mark drawn from the name of T. S. Walton to beginning of answer notation as follows:)

"Seals on car When rec'd from M. O. P. Conn. were 660771 and 660772.

P. W. Furry."

There is a stamp in the face of said letter as follows: "Missouri Pacific Ry., O. R. & W. Division, Jan. 8, 1921. St. Louis, Mo. Freight Claim Department."

Also: "St. L. S. F. R. R. Received Mail Desk Jan. 3, 1921. Local Freight Office, Ft. Smith, Ark."

[fol. 76] G. H. TEMPLETON, a witness for the defendant, being sworn, testified as follows:

Q. State your name?
A. G. H. Templeton.
Q. Are you the Chief Clerk at the Frisco office?
A. Yes, sir.
Q. Were you in 1920?
A. Yes, sir. Not in 1920.
Q. What is your work? What was your work in 1920?
A. Cashier.
Q. What were you doing in 1921?
A. Chief Clerk there.
Q. Here is a letter signed P. W. Furry on the typewriter and do you know who wrote that letter?
A. I think T. E. Walker claim agent of the road, he is in Muskogee now.
Q. Mr. Furry was general agent of the company and Mr. Walker was his chief clerk?
A. Yes, sir.

Mr. Miles: We offer the letter.

Offer overruled and defendant excepted.

The letter referred to was identified as Ex. J, and is as follows:

Copy

File 19-352.

Frisco Lines

Fort Smith, Arkansas, April 20th, 1920.

[fol. 77] Mr. H. E. Johnson, Missouri Pacific, Fort Smith, Ark.

DEAR SIR: C. C. & O. 8109, received from your line 16th loaded with sugar. Car was pulled off the connection this morning at 8:00 o'clock and found sugar leaking from under the door. Opened the

car and found one sack against the car, hole rubbed through the door and practically all of the contents gone.

Yours truly, P. W. Furry, General Agent.

Mr. Miles: Who actually went into the yard and looked at the car and made the seal records?

A. That is done by several different clerks.

[fol. 78] Joe Brion, a witness for the defendant, being sworn, testified as follows:

Q. What is your name?

A. John Brion.

Q. Did you check seals in the Missouri Pacific yard in 1920?

A. Yes, sir.

Q. Did you keep a record of the seals of cars delivered by the Missouri Pacific Railroad Company to the Frisco?

A. Yes, sir.

Q. Delivered on the connection?

A. Yes, sir.

Q. Have you a record of the seals of this car C. C. & O. 8109?

A. Yes, sir.

Q. Turn to your record of that and state the date you delivered it to the Frisco and when you checked it and what the seals were on it?

A. The car came in on April 19th on Extra-1803, the number was 8109 C. C. & O., Southern Pacific seals 660771 and 660772.

Q. Did you check these seals on the Frisco connection?

A. No, sir.

Q. When did you check them and where?

A. As the train came into the yard.

[fol. 79] Q. When was it set on the Frisco connection?

A. I have not got that.

Q. You did check the seals on that car when it came in, when the train came in the yard?

A. Yes, sir.

Q. And those were the numbers of the seals?

A. Yes, sir.

Q. What time was it switched to the Frisco connection?

A. I have not got that.

Q. What was the date it came in?

A. April 19th.

Q. And those seals were on it at the time it came into the yard in the train?

A. Yes, sir.

Q. On April 19th, 1920?

A. Yes, sir.

Q. And you checked them yourself?
A. Yes, sir.
Q. At the time it arrived in Fort Smith?
A. Yes, sir.

Cross-examination:

Q. How long have you worked for the Frisco?
A. For the Missouri Pacific?
Q. How long?
A. About three years.
Q. Are you working for it now?
[fol. 80] A. Yes, sir.
Q. This check you speak of was it made in the Frisco yards?
A. No, sir; in the Missouri Pacific yards.
Q. That was before the car was placed on the Frisco connection?
A. Yes, sir.
Q. You don't know what happened to it after it was placed in the Frisco connection?
A. No, sir.
Q. You never saw the seals after that?
A. No sir.
Q. You don't know what seals were on the car when Frisco switchmen actually picked it up and started with it?
A. No, sir.
Q. You do not know how long after it was placed on the Frisco connection before the Frisco switchmen picked it up?
A. No, sir.
Q. You do not know what happened to the car in the mean time?
A. No, sir.

[fol. 81] C. A. PERRYMAN, a witness for the defendant, being sworn, testified as follows:

Q. What is your name?
A. C. A. Perryman.
Q. You are the agent of the Missouri Pacific at Fort Smith?
A. Yes, sir.
Q. Does the Missouri Pacific Railroad Company run into Raceland or Alexander, Louisiana?
A. It runs into Alexander.
Q. Does it run into Raceland, La.?
A. I do not think so.
Q. What is M. L. T.?
A. Morgan's Louisiana and Texas Railroad and Steamship Company.
Q. State what is marked on a car when it is weighed?
A. That is the weight of the car when empty.
Q. Tell the method of weighing a car load of merchandise?
A. You weigh the whole thing and deduct the weight of the car

from the gross amount; deduct the stenciled weight on the car, and the difference is the weight of the merchandise.

Q. That is the uniform way of weighing car load lots of merchandise.

A. Yes, sir.

[fol. 82] Cross-examination:

Q. Are you a car weigher?

A. I am the agent of the Missouri Pacific Railroad Company, and I do weigh cars?

Q. You have weighed cars?

A. Yes, sir.

A Juror:

Q. Have you not a record of the transmission of the car from the Missouri Pacific to the Frisco?

A. That is the interchange.

Q. We haven't been shown the record for that.

A. I don't think so.

Q. Have you that record?

A. I can get it.

(Witness leaves for record.)

[fol. 83] Thereupon, counsel for the defendant read to the jury the deposition of FRANK E. BROUSSARD, on behalf of the defendant, without objections, as follows:

1. Please state your name, age, residence and occupation, and what you were doing in April, 1920?

A. Frank A. Broussard, forty-one years of age, City of Lafayette, Louisiana; I was occupied as inspector and sworn weighmaster of Lafayette, Louisiana, in April, 1920.

2. If you state that — were sworn weighmaster in Louisiana and located at Lafayette, La., in April, 1920, please state whether or not you weighed a car of sugar on that month being C. C. & O. #8109, and if so, to what point was the car consigned?

A. On April 11, 1920, I weighed car C. C. & O. No. 8109, and it was destined to Fort Smith, Arkansas.

3. If you state that you weighed such car of sugar, please give the gross weight of the car and then the net weight of its contents at Lafayette, La.; also give date on which you weighed the car?

A. The gross weight of said car C. C. & O. No. 8109 was ninety thousand one hundred pounds and the net weight was forty four thousand three hundred pounds; the said car was weighed on April 11, 1920.

4. Please state to the court whether or not you- weight as given to us was the correct weight of the car and how you arrived at the [fol. 84] weight of its contents?

A. The weight as given above in answer to interrogatory three was the correct weight; I arrived at the weight of this car by subtracting the stenciled weight of the car from the gross weight.

Cross-interrogatories:

1. If you state that you weighed the car described in direct in-errogatory 2, please state whether you made out a scale ticket, and whether or not you have such scale ticket in your possession, or whether you have access to it. If so, please mark it "Exhibit A" and attach to your deposition. If you cannot attach the original scale ticket, please attach as "Exhibit A" to your deposition a true copy thereof and state why you could not attach the original?

A. I did make out a scale ticket as per copy hereto attached, and marked Exhibit "A"; original scale ticket is not attached, as I. C. C. regulations require original scale tickets to be kept on file.

2. Please state the kind of scale used in weighing this car, that is, state whether the scale was a beam scale or an automatic scale. Also state the name of the manufacturer and the number of model of scale; also state how long the scale had been in use at Lafayette?

A. The said car was weighed on a beam scale, manufactured by the Fairbanks Company, being *Bo.* 191,206; this scale was installed [fol. 85] in Lafayette October 1915.

3. Please state how you arrived at or ascertained the tare weight of the car?

A. The tare weight of the car was stenciled tare of the car.

Exhibit A is as follows, atached to deposition of F. E. Broussard:

Southern Pacific Lines Scale Ticket

Date: 4/11/20 A. Western Railway Weighing Ass'n. Standard. Car weighed: Initial: C. C. & O. Car Number: 8109. Uncoupled at Lafayette. Marked capacity: 100 3/19. 90900 Gross. 466 Tare. 443 Net. Remarks: leave.

F. E. Broussard, signature of sworn weighmaster.

(Hold this ticket for station record. File in date order by months.)

[fol. 86] Thereupon, without objection, counsel for the defendant read in its behalf the deposition of E. A. FISCHER, as follows:

Interrogatories:

1. Please state your name, age, residence and place of occupation?

A. E. A. Fischer; 29 years old; Morgan, La. & Texas Railroad and S. S. Company's agent; agent for the same Company.

2. If you state that you were agent for Morgans. Louisiana & Texas Railroad and Steamship Company in April, 1920, please state

if you issued a bill of lading for Car C. C. O. No. 8109, if so, what did said car contain?

A. Issued Bill of Lading, car supposed to contain 500 bags of sugar.

3. If you say that said car contained sugar, will you please tell the court whether or not you or any other representative of the Railway Company checked the amount of the sugar in the car, or whether the shipper checked the amount of sugar in the car?

A. Car was loaded at Mathews, La., a non Agency station located about five miles from this point, same was loaded by shippers at their refinery switch the contents of the car was counted by the shippers and the car was sealed by them. The shipment was ac-
[fol. 87] cepted for as "Shippers Load and Count."

4. Was the car weighed at Mathews, and if not, how was the weight which was placed in face of the Bill of Lading arrived at?

A. Weight arrived at by shippers.

5. How long a time elapsed between the issuance by you of the Bill of Lading and the placing of the seals on the car? What seals were placed on the car?

A. Don't know, car loaded and sealed by shippers; Seals were Sunset Lines number 660771 and 660772.

6. If you state in the bill of lading that there were 500 bags granulated sugar, please state how such an amount of sugar was arrived at, and if you had any understanding with the shipper as to the amount of sugar. If so, what was the understanding?

A. Car loaded at non agency station, and accepted as shippers load and count.

No cross interrogatories.

[fol. 88] C. A. PERRYMAN, recalled, testified for the defendant further, as follows:

Mr. Miles:

Q. Have you the record of the Missouri Pacific office here showing the Frisco's receipt for this interchange cars and dates?

A. Yes, I have the record I made of the interchange from one to the other railroad of the receipt of cars the various lines.

Q. Have you that record with you in court now?

A. Yes, this is it.

Q. Refer to the record and tel——

Mr. Woods: Who made that Record?

A. It was made by my clerk.

Q. You did not make it?

A. No, sir. It was made under my direction.

Mr. Woods: We object to it.

Mr. Miles:

Q. This is a permanent record of the Missouri Pacific here at Fort Smith?
A. Yes, sir.
Q. It is in your possession now?
A. Yes, sir.
Q. It is a permanent record of the Missouri Pacific made under your direction and kept in your possession and you have it now?
[fol. 89] A. Yes, sir.

The Court: The objection is overruled and exceptions of plaintiff saved.

Mr. Miles:

Q. Refer to that record and tell what date this car was receipted for by the Frisco as having been set out on their connection?
A. This record shows at 4 P. M. 4/19.
Q. On the 19th of April at four o'clock in the evening?
A. Yes, sir.
Q. Is that receipted for by the Frisco?
A. Signed by Stamp, P. W. Furry agent for the Frisco.

A Juror:

Q. Does that show the seals?
A. No, sir.

Mr. Woods:

Q. That record does not show the date on which that stamp was put there, does it?
A. That is the date right there.
Q. That is the date of your record?
A. Our record, it will show the date.
Q. That is not the date the stamp was put there?
A. They are stamped and delivered each day.
Q. At what time?
A. We deliver them up to midnight, and they get the interchange next morning, but these are registered at the time the car is delivered to the various lines.
[fol. 90] Q. Then, if this was delivered in the afternoon, it would not have been signed or stamped by Mr. Furry until the next morning?
A. No, except telephone deliveries of freight.
Q. Do you know whether a telephone delivery of that was accepted?
A. That was accepted.
Q. How do you know?
A. If it had not been, it would not have been signed for at 4 P. M. by P. W. Furry.
Q. Was that signed for at 4 P. M.?

A. Here is the interchange report signed receipted at 4 P. M. by P. W. Furry, by stamp.

Q. The next morning?

A. He takes his interchange to show that he gets it before he signs it.

Q. You don't know whether that was a telephone acceptance?

A. Not this particular car, but that is the custom.

Q. I am asking about this particular car. Do I understand you to admit that you never heard of any such thing as a sworn weigh-master?

A. Oh, yes, they all have to be.

Q. You know what a sworn weigh-master is?

A. Yes, my regular weighman is sworn.

Q. Have you ever been one?

A. Yes; our yard clerks are now sworn weighmasters.

[fol. 91] Q. You make most anybody a weigh master?

A. No, sir; make the yard clerk take the oath.

Q. What is the proper way to weigh a car that is one of a string of cars—cut the other cars off and weigh it by itself?

A. You cut one end off.

Q. The weigh master always cuts one end off?

A. Yes, sir.

Q. Have you ever seen them weigh a car without cutting one end off?

A. No, sir.

Q. What would be the effect if the car was weighed without cutting one end off?

A. Chances are it would weigh heavy on one end, light at the other.

Q. Suppose the scale sets a little higher than the level of the track both ways, then if the car was weighed without uncoupling it would weigh a good deal heavier?

A. No, sir; it would be lighter because the cars on each end would be pulling down on it.

Q. The gross weight would be higher and the tare less?

A. No, the tare weight is always the same, that weight is stenciled on the car.

Q. That is done when the car is manufactured?

A. When it is manufactured and when it is remodeled and the last time they weigh them; th*at* are supposed to weigh cars every [fol. 92] six or eight months.

Q. Do you know when this car in question was weighed the last time or remodeled with the weight stenciled on the last time?

A. I haven't the least idea.

Q. The failure to uncouple the car and weigh it with cars attached to both ends might have effect of making the car a good deal heavier or a good deal lighter?

A. Abo*s*lutely, the couplers one would be high and the other low; it would depend on which way it would be pulling.

A Juror:

Q. Is it not customary to cut both ends loose in weighing a car.
A. The practice is to cut loose one end, but sometimes both ends are cut loose.

Here the defendant rested its case.

[fol. 93] It was here admitted that the witness Valentine would swear that after the car in question was actually placed to the store of Reynolds-Davis store, he discovered something wrong with the car door and put a padlock on it, and told Mr. H. E. Johnson, the agent of the Missouri Pacific, to come and inspect it.

Here the parties to this action rested their case; and this was all the testimony introduced in this case.

[fol. 94] Thereupon, at the request of the plaintiff, the court instructed the jury as follows:

PLAINTIFF'S INSTRUCTIONS

2. If you find for the plaintiff you will assess its damages at whatever sum, if any, you find the value of the sugar damaged or destroyed, if any, not exceeding the amount sued for.

To the action of the court in giving over the objections of the defendant, instruction No. 2 requested by plaintiff, defendant, at the time, saved its exceptions.

3. Gentlemen of the jury, if you find that the sugar involved in this suit was delivered to Morgan's Louisiana and Texas Railroad and Steamship Company by B. C. Perkins & Company at Matthews, Louisiana, for transportation to plaintiff, at Fort Smith, and bill of lading issued thereon to the said shipper by the said carrier and that defendant, as the last connecting carrier under such bill of lading received all of said sugar, and failed to deliver the same to plaintiff, or any part thereof, then your verdict will be for plaintiff.

And to the action of the court in giving, over the objections of defendant, instruction No. 3, asked for by plaintiff, the defendant, at the time, saved an exception.

[fol. 95] 4. Gentlemen of the Jury, if you find that the sugar involved in this suit was delivered to the initial carrier by B. C. Perkins & Company for transportation to plaintiff at Forth Smith, and that the defendant, as the last connecting carrier operating under the bill of lading, failed to deliver said sugar, or any part thereof to plaintiff, unless you further find from the evidence that the loss, if there was a loss, did not, in fact, occur on defendant's line, or on the lines of its agent the St. Louis & San Francisco R. R. Co., and the burden is upon the defendant to prove that the loss, if any, did not occur on its lines or the lines of its said agent.

And to the action of the court in giving, over the objections of the defendant, instructions No. 4, asked for by the plaintiff, the defendant, at the time, saved its exceptions.

5. Gentlemen of the Jury, you are instructed that in the event you find that a part of the shipment of sugar involved in this suit was lost or de-troyed in transit, such loss or destruction under the law is presumed to have occurred while said sugar was in the possession of the last connecting carrier under the bill of lading, and such presumption will continue until overcome by testimony that the loss occurred somewhere else, and the burden of proving that such loss or [fol. 96] damage occurred elsewhere is upon the defendant.

6. If you find that the initial carrier issued a bill of lading covering the sugar which plaintiff claims was not delivered to it, such bill of lading itself constitute*w* prima facie evidence of the fact that such sugar was actually delivered to such initial carrier, and the burden is upon the defendant to prove by positive testimony that such sugar was not in fact delivered to the initial carrier.

And to the action of the court in giving over the objections of the defendant, instruction No. 6, the defendant, at the time saved its exceptions.

7. You are instructed that under the law a railroad carrier in the absence of a contract to the contrary, is an insurer of all goods received by it for shipment and it is not necessary for plaintiff to prove actual negligence on the part of defendant in order to recover in this case.

And to the action of the court in giving, over the objections of the defendant, instruction No. 7, the defendant at the time, saved its exceptions.

[fol. 97] The defendant requested the court to give to the jury the following instructions which were refused by the court:

INSTRUCTIONS REQUESTED BY DEFENDANT REFUSED

I. You are instructed that under the law and the evidence, the plaintiff is not entitled to recover and your verdict must be for the defendant.

And to the action of the court in refusing to give instruction No. I, asked for by the defendant, the defendant, at the time, saved an exception.

II. You are instructed that if you believe from the evidence that this sugar was delivered to another railroad than the defendant Missouri Pacific Railroad Company, for transmission from Raceland, Louisiana, to Reynolds-Davis Grocery Company, Fort Smith, Arkansas, and that it was actually delivered to the Reynolds-Davis Grocery Company, by the St. Louis & San Francisco Railroad Company, then the defendant, Missouri Pacific Railroad Company is an intermediate carrier and before the plaintiff is entitled to recover, the

plaintiff must prove by a preponderance of the evidence that the sugar was lost, if you should find it was lost, while the shipment was in the hands of the defendant, Missouri Pacific Railroad Company.

And to the action of the court in refusing to give instruction No. II, asked for by defendant, the defendant, at the time, excepted.

[fol. 98] III. You are instructed that if you believe from the evidence that the initial carrier to whom the sugar was delivered for transmission to the Reynolds-Davis Grocery Company at Fort Smith, Arkansas, was a Railroad Company other than the Missouri Pacific Railroad Company, and that the sugar was actually delivered to the Reynolds-Davis Grocery Company by the St. Louis & San Francisco Railroad Company, another carrier separate and distinct from the Missouri Pacific Railroad Company, then no presumption arises that the sugar was lost while the shipment was in the possession of the Missouri Pacific Railroad Company, and before the plaintiff is entitled to recover, they must prove that the loss occurred while the sugar was in the possession of the defendant.

And to the action of the court in refusing to give instruction No. III, asked for by the defendant, the defendant, at the time, saved its exceptions.

V. You are instructed that if the Missouri Pacific Railroad Company delivered the car to the St. Louis & San Francisco Railroad Company in Fort Smith, Arkansas, in the same condition that it received the car from the initial carrier, then your verdict should be for the defendant, Missouri Pacific Railroad Company.

And to the action of the court in refusing to give instruction No. V, asked for by the defendant, the defendant at the time saved its [fol. 99] exceptions.

The defendant requested the following instruction, which was given by the Court.

IV. You are instructed that if you believe from the evidence that the sugar was extracted from the car or lost, if you believe it was so extracted or lost, before the car was delivered to the defendant, Missouri Pacific Railroad Company, then you will find for the defendant, Missouri Pacific Railroad Company, for such sugar as you may find was extracted from the car before it was delivered to the Missouri Pacific Railroad Co.

The plaintiff objected to the giving of instruction No. IV, given on behalf of the defendant, and to the action of the court in this regard, saved an exception.

Plaintiff also requested the following instructions which were refused by the court:

1. Gentlemen of the jury, if you find for the plaintiff your verdict will be for the sum of $1,023.66 and interest thereon from April 21, 1920, to this date at the rate of six per cent per annum.

[fol. 100] And to the action of the court in refusing to give in-

struction No. 1, asked for by the plaintiff, the plaintiff at the time excepted.

2. Gentlemen of the jury, if you find for the plaintiff, your verdict will be for whatever sum you find to have been the market value at Fort Smith, on April 21, 1920, of whatever sugar you find from the evidence defendant failed to deliver in addition to the market value of whatever sugar you fnd to have been damaged, destroyed or retained by defendant as salvage, if any, together with whatever sum you find to have been paid by plaintiff in the way of freight charges and war tax charges if any on sugar not delivered, or damaged or destroyed or retained, together with interest on such total sum at the rate of six per cent per annum from April 21, 1920, until this date, provided however the amount of your verdict, exclusive of interest, cannot exceed the sum for which suit was brought.

To the refusal of the court to give instruction No. *1*, as above written, requested by plaintiff, the plaintiff saved an exception.

Mr. Miles: The defendant objects specifically to the language of the court designating the St. Louis & San Francisco Railroad Company as the agent of the defendant, Railroad Company.

[fol. 101] Said specific objection was overruled by the court, and the defendant excepted.

The above and foregoing were all the instructions asked for, given or refused on either side in this case.

[fol. 102] After the instructions of the court, and the arguments of counsel, the jury retired to consider of their verdict; and afterwards and on the same day returned into open court the following verdict, to-wit:

VERDICT

"We the jury find for the plaintiff for the amount sued for, to-wit: $992.22 and interest from April 21, 1920.

(Sig.) Arthur H. Morrow, Foreman.

Thereupon, the defendant filed its motion for a new trial, which motion (with caption omitted) is in words and figures as follows:

[fol. 103] MOTION FOR A NEW TRIAL—Filed October 30, 1922

Comes the defendant, Missouri Pacific Railroad Company, and moves the court to set aside the verdict of the jury heretofore rendered in this case against the defendant, grant it a new trial, and for cause says:

1. The verdict of the jury is contrary to the law.

2. The verdict of the jury is contrary to the evidence.

3. The verdict of the jury is contrary to both the law and the evidence.

4. The verdict of the jury is not supported by sufficient evidence.

5. The court erred in excluding from the jury the testimony of witness, P. W. Furry, that when the Missouri Pacific Railroad Company turned the car over to the Frisco and it was receipted for, the liability or responsibility of the former ceased.

6. The court erred in refusing to admit in testimony a letter bearing the signature of P. W. Furry, the said witness having stated that the letter bore his signature but was written by and signed by a clerk in his office.

7. The court erred in admitting, over the objections of the defendant, the testimony of witness, J. F. Foster, that he had knowledge of a car of sugar standing on the Missouri Pacific Connection with the [fol. 104] door open a day or two along about that time, (admitted conditionally).

8. The court erred in admitting, over the objections of defendant, Exhibit C, purporting to be a signed inspection of the car by H. E. Johnson, Agent of the defendant; said exhibit testified to by witness H. H. F. Valentine.

9. The court erred in refusing to permit defendant to introduce in evidence Exhibit I, a statement made by witness, Leo Waters, the court permitting the said witness to use the same for the purpose of refreshing his memory.

10. The court erred in admitting, over the objections of the defendant, letter attached to deposition of G. H. Templeton's deposition given on behalf of the plaintiff.

11. The court erred in refusing to give to the jury instruction No. I, asked for by the defendant.

12. The court erred in refusing to give to the jury instruction No. II, asked for by the defendant.

13. The court erred in refusing to give to the jury instruction No. III, asked for by the defendant.

14. The Court erred in giving to the jury, over the objections of the defendant, instruction No. 2, requested by plaintiff.

15. The court erred in giving, over the objections of the defendant, instruction No. 3, asked for by the plaintiff.

[fol. 105] 16. The court erred in giving, over the objections of the defendant, instruction No. 4, asked for by the plaintiff.

17. The court erred in giving, over the objections of the defendant, instruction No. 5, asked for by the plaintiff.

18. The court erred in giving, over the objections of the defendant, instruction No. 6, asked for by the plaintiff.

19. The court erred in giving, over the objections of the defendant, instruction No. 7, asked for by the plaintiff.

20. The court erred in overruling the special objection that defendant made to the statement of the court in the instruction that they should regard the Frisco as agent of the defendant, Missouri Pacific.

By Vincent M. Miles, Attorney for Defendant."

[File endorsement omitted.]

[fol. 106] ORDER SETTLING BILL OF EXCEPTIONS—Filed February 5, 1923

And the court having said motion for a new trial under advisement and being well and sufficiently advised in relation to the same, overruled said motion; and to the action of the court in overruling said motion for a new trial, the defendant, at the time, saved its exceptions; and prayed an appeal to the Supreme Court, which was granted, and the defendant was given 90 days within which to prepare and file its bill of exceptions in this case.

Now, comes the defendant, and offers the above and foregoing as and for its bill of exceptions in this case and asks that the same be signed and sealed and made a part of the record herein, which is accordingly done this 5th day of February, 1923.

John Brizzolara, Judge 12th Judicial Circuit of Arkansas.

[File endorsement omitted.]

[fol. 107] IN THE SEBASTIAN CIRCUIT COURT FOR THE FORT SMITH DISTRICT

[Title omitted]

STIPULATION

It is stipulated by and between Daily and Woods, attorneys for the plaintiff, and Vincent M. Miles, attorney for the defendant, that the foregoing bill of exceptions is a complete bill of exceptions in the case of Reynolds-Davis Grocery Company v. Missouri Pacific Railroad Company, and that the bill of exceptions contains all the evidence and exceptions thereto introduced at the trial, and all of the instructions given, requested and refused and the Court's ruling thereon, and that it may be signed by the Court as a true and complete bill of exceptions in this case.

Daily & Woods, Attorneys for Plaintiff. Vincent M. Miles, Attorney for Defendant.

[fols. 108 & 109] SUPERSEDEAS BOND FOR $992.00—Filed November 14, 1922; omitted in printing

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[fols. 110 & 111] CERTIFICATE

STATE OF ARKANSAS,
County of Sebastian, ss:

I, S. A. Lynch, Clerk of the Circuit Court within and for the County and State aforesaid and for the Fort Smith District thereof, do hereby certify that the annexed and foregoing 103 pages of typewriting contain a true, complete and compared transcript of the record in the within styled cause; together with a true fee bill thereof. In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court on this the 8th day of February, 1923.

S. A. Lynch, Clerk of the Circuit Court, by Claude Hoffman, D. C. (Seal.)

[fol. 112] STATE OF ARKANSAS, ss:

IN THE SUPREME COURT

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court House, in the City of Little Rock, on the 26th day, being the fourth Monday of November, A. D. 1923, amongst others, were the following proceedings, to-wit: On the 10th day of December, A. D. 1923, a day of said Term:

MISSOURI PACIFIC RAILROAD COMPANY, Appellant,

vs.

REYNOLDS-DAVIS GROCERY COMPANY, Appellee

Appeal from Sebastian Circuit Court, Fort Smith District

This cause being regularly called, come the parties thereto by their attorneys, and said cause is submitted upon the transcript of the record and the briefs filed, and is by the Court taken under advisement.

[fol. 113] NOVEMBER TERM, 1923, DECEMBER 24, 1923

[Caption omitted]

This cause came on to be heard upon the transcript of the record of the circuit court of Sebastian county, Fort Smith District, and was argued by counsel, on consideration whereof it is the opinion of the Court that there is no error in the proceedings and judgment of said circuit court in this cause.

It is therefore considered by the Court that the judgment of said circuit court in this cause rendered be, and the same is hereby, in all things affirmed with costs, and that said appellee recover of said appellant and I. H. Nakdimen, surety in the supersedeas bond filed in this cause, the sum of nine hundred and ninety two dollars and twenty two cents, with interest at six per cent from the 25th day of October, A. D. 1922, the amount of judgment of said circuit court.

It is further considered that said appellee recover of said appellant and said surety, all its costs in this court and the court below in this cause expended, and have execution thereof.

[fol. 114] IN THE SUPREME COURT OF ARKANSAS

[Title omitted]

OPINION—Dec. 24, 1923

WOOD, J.: This action was instituted by the appellee against the appellant to recover the sum of $1,026.66, damages alleged to have been incurred by the appellee on account of the loss of sugar out of a car shipped from Raceland, La., to Fort Smith, Ark., under a bill of lading dated April 7, 1920, issued by Morgan's Louisiana & Texas Railroad & Steamship Company in Louisiana. The non-agency station was called Mathews. It was five miles from the agency station of Raceland. The sugar was routed, as shown by the bill of lading, over the lines of the appellant from its connection with the Southern Pacific lines to Fort Smith, its destination on appellant's line. The appellant had no track of its own at Fort Smith to the warehouse of the appellee where the appellee wished the car delivered. The St. Louis & San Francisco Railroad Company had a track connecting with the track of the appellant and by a switching arrangement between them the appellant delivered the car to the Frisco to be delivered to the warehouse of the consignee. The Frisco did not handle the car under the bill of lading and did not share in the distribution of the freight charges. The appellant paid the Frisco the sum of $6.30, its switching fee, for the service in switching the car to the warehouse of the appellee. This switching fee charge was covered by the tariff on file with the Interstate Commerce Commission. The [fol. 115] bill of lading was surrendered by the appellee to the appellant and the appellant delivered the car to the appellee through the Frisco railroad as above indicated.

The loading of the car at Raceland, Louisiana, was done by the shipper's general superintendent who had been in its employ for thirty-six years. He checked and counted the sacks. There were 500 sacks weighing 100 lbs. each. After counting and checking the sacks, he applied the seals to the car. The bill of lading shows that there was a total weight of sugar, including the sacks, of 50,250 lbs. The car arrived at Fort Smith on April 19th and on that day was delivered by the appellant to the Frisco railroad in good order with

the seals unbroken. The appellant took a receipt from the Frisco Railroad showing that the car was in good order when delivered to the latter company. When the car was delivered by the latter company to the appellee's warehouse the original seals had been broken and had been replaced by a Frisco seal. When the car was opened by appellee's receiving clerk it was discovered that a large number of sacks of sugar had been removed from the center of the car. Upon checking and counting the sacks it was found that there were 60 sacks short of the number included in the shipper's invoice and in the bill of lading. It was also found that the other sacks had been mutilated and 106 lbs. of sugar taken therefrom. The value of the sugar lost was $992.22.

The cause was sent to the jury upon substantially the above facts and it returned a verdict in favor of the appellee against the appel- [fol. 116] lant for the above sum. Judgment was entered accordingly, from which is this appeal.

1. The action by the appellee against the appellant was predicated upon the theory that the appellant was liable under the bill of lading as the delivering carrier. The appellant contends that it was neither the initial nor the delivering carrier and that the undisputed testimony showed that the loss did not occur on its lines, and that, therefore, it was not liable.

The appellee, on the other hand, contends that the appellant under the bill of lading was the delivering carrier and that the Frisco railroad, in delivering the car to appellee's warehouse in Fort Smith, was merely acting as the agent of the appellant.

The appellant prayed the court to instruct the jury in accordance with its contentions, which the court refused, but, over the objection of appellant, gave prayers according to the appellee's contention. The instructions of the court were correct.

This was an interstate commerce shipment, and the well settled rule concerning such shipments is that "in the absence of statute, or special contract, each connecting carrier on a through route is bound only to safely carry over its own line and safely deliver to the next connecting carrier, and the liability of a connecting carrier for the safety of the property delivered to it for transportation, commences when it is received and is discharged by its delivery to and [fol. 117] acceptance by a succeeding carrier, or its authorized agent." Oregon-Washington Co. v. McGinn, 258 U. S. 409-413, and other cases cited in the opinion.

This doctrine is not applicable to the facts of this record for the reason that the car load of sugar was shipped under a special contract under which the appellant was the delivering carrier. The bill of lading evidencing the special contract under which the shipment in controversy was made, shows that the appellant was the last connecting carrier operating under the bill of lading. This was a through bill of lading from the non-agency station at Mathews, La., to Fort Smith, Arkansas, in which the appellant undertook to make the delivery to the consignee at Fort Smith. The Frisco Railroad Co. was not named in this bill of lading as a connecting carrier and

the services it performed in the premises under its switching arrangements with the appellant were not as a connecting carrier, but purely and simply at the instance, and as the agent, of appellant. The terms of the bill of lading control here. Under those terms the appellant is undoubtedly the terminal carrier and bound itself under the terms of the contract to make the delivery, and it cannot shift its liability upon the shoulders of some other carrier or agency which was not in the contemplation of the parties to the contract. The Frisco Railroad would not be any more liable under this contract than would some transfer company in the City of Fort Smith whom the appellant had employed to deliver the sugar to appellee's [fol. 118] warehouse after the car arrived at Fort Smith, its destination. In other words, if the appellee had sued the Frisco railroad for its loss instead of the appellant, the Frisco railroad company would not be liable to the appellees for the simple reason that under the contract of shipment, the bill of lading, the Frisco Railroad Company had not contracted with the appellee to deliver its car load of sugar to appellee's warehouse in Fort Smith. This was a service which, under the bill of lading, the appellant had contracted with the appellee to perform and it undertook the performance thereof through its agent, the Frisco Railroad Company. The following cases sustain the above conclusion: Western Atlantic Ry. Co. v. Exposition Cotton Mills, (Ga.) 2 L. R. A. 102; 7 S. E. 916; Sapiro v. Boston & Maine Ry. Co. 213 Mass. 70; 99 N. E. 459; St. Louis S. W. Ry. Co. v. A. A. Jackson & Co. 118 S. W. 853; Atlanta National Bank v. So. Ry. Co. 106 Fed. 623.

Learned counsel for appellant contend that these were cases from State courts and that they had no application to an interstate shipment of freight which is controlled by the interstate commerce act, and that inasmuch as the published tariff of the interstate commerce act provided the rate which the Frisco Railroad should receive for removing cars from the connection of the appellant with the Missouri Pacific Railway Co. in Fort Smith, that the Frisco Company and not the appellant was the delivering carrier. It occurs to us that this contention of the appellant is directly in the teeth of the contract under which the car load of sugar in controversy was [fol. 119] shipped. The Frisco Railroad as already stated is not named in the bill of lading as a connecting or delivering carrier; but on the contrary, the appellant is expressly named as the delivering carrier, its line reaches to the City of Fort Smith, and it expressly undertakes to deliver this sugar in good order at its destination. It is bound by the terms of its contract. The interstate commerce act and the power of the interstate commerce commission thereunder to fix a schedule of rates for the Frisco Railway Company and the appellant as common carriers has no application to the facts of this record. While this was an interstate shipment, it is governed entirely by the contract under which the shipment was made and there is nothing in this contract contrary to the provisions of the Interstate Commerce Act or the Transportation Act. There is nothing in those acts, as we view them, making it unlawful for the appellant to

undertake, as the last or terminal carrier, in a through interstate commerce shipment to deliver goods, which it has received from connecting carriers, to consignees at their destination.

True, the above cases, save one, were decisions of State courts, and, learned counsel for appellant contend that inasmuch as this was an interstate commerce shipment, they are not authority. But, all of the above cases involved interstate commerce shipments and the facts are sufficiently similar to make them applicable here. They are predicated upon the doctrine that the contracts of shipment evidenced by the bills of lading are controlling. That is a sound rule and is approved in the case of Georgia F. A. Ry. Co. v. Blish Milling [fol. 120] Co., 240 U. S. 190.

2. The appellant contends that the court erred in not directing a verdict in its favor. It could serve no useful purpose to set and discuss in detail the testimony in the record. Suffice it to say we have examined it and are convinced that it was a question for the jury to determine whether there was the loss of the sugar in controversy, and if so, whether such loss occurred before the car was delivered to the appellant, or after appellant had received the same.

3. Appellant assigns as error the ruling of the court in permitting witness Foster, who was the chief yard clerk for the Frisco Railway in Fort Smith at the time of the alleged loss of sugar in controversy, to testify that along about the month of April, 1920, there was a car of sugar which sat on the Missouri Pacific connection for a day or two with the door open. Witness was not sure that it was sugar, but that was his impression. He knew that it was a high class commodity. He gave the clerk who worked with him instructions to seal the car. It was the only car reported to witness about that time in that condition. The car had been switched to the Frisco Railway from the Missouri Pacific.

Another witness testified, to which appellant made no objection, to the effect that he was employed in the Frisco yards in April, 1920. It was his duty to spot all the cars delivered to the wholesale places and to do the team track work. He would get the cars from the Missouri Pacific or the Kansas City Southern connections. He had [fol. 121] a record of a car delivered to the Reynolds-Davis Grocery Company loaded with sugar on the 20th or about the 20th of April, 1920. About that date he saw a car standing down on the Missouri Pacific connection—a car of sugar—with the door on the east side open. He never heard or knew of any other car of sugar on that connection in that condition about, or anywhere near that time.

F. P. Lytton, another witness testified, without objection, that he was a switchman employed by the Frisco Railway in 1920, and that his duties carried him all over the Frisco yards including the connection between the Frisco and the Missouri Pacific. He remembered that about, or something near the 20th of April, 1920, having seen a car of sugar standing on the Missouri Pacific connection with

the door open; that was the only car of sugar he saw about that time in that condition.

The testimony of the last two witnesses was but cumulative of the testimony of Foster. All of this testimony was relevant as circumstance tending to throw light on the issue as to whether or not sugar had been stolen from the car in controversy while it was in the possession of the appellant or its agent. Peterson v. Graham, 25 Ark. 380; Tucker v. West, et al., 29 Ark. 386; see, also, 2 Jones on Evidence, pgs. 154-195.

4. The appellant offered to introduce certain letters for the purpose of contradicting the testimony of one of the witnesses for the appellee. The court refused to permit these letters in evidence. It [fol. 122] would unduly extend this opinion, and could serve no useful purpose, to set out these letters and discuss this assignment of error in detail. Suffice it to say we have examined it and find no error in the ruling of the court in this particular. This disposes of all assignments of error argued in appellant's brief. No reversible error appearing in the rulings of the trial court, its judgment is affirmed.

[fol. 123] November Term, 1923

(Caption omitted)

SUBMISSION OF PETITION FOR REHEARING—January 14, 1924

The petition for rehearing filed herein being regularly called, is submitted with the briefs filed and is by the court taken under advisement.

[fol. 124] IN THE SUPREME COURT OF ARKANSAS

[Title omitted]

PETITION FOR REHEARING—Filed January 7, 1924

Comes now the appellant, Missouri Pacific Railroad Company, and moves the Court to grant it a rehearing in the above entitled case and, for grounds therefor, says:

1

The court erred in holding that the St. Louis-San Francisco Railroad Company was not connecting carrier of the Missouri Pacific Railroad Company, but that it was purely and simply an agent of the appellant, Missouri Pacific Railroad Company.

The Court err- in this language in its opinion:

"In other words, if the appellee had sued the Frisco Railroad for for its loss instead of the appellant, the Frisco Railroad Company would not be liable to the appellee for the simple reason that under the contract of shipment, the bill of lading, the Frisco Railroad had not contracted with the appellee to deliver this carload of sugar to the Appellee's warehouse in Fort Smith. This was a service, which under the bill of lading, appellant had contracted with the appellee to perform, and it undertook the performance thereof through its agent, the Frisco Railroad Company."

[fol. 125] The bill of lading provides that no connecting carrier shall be liable for any damage that does not occur on its own line. The Court in its opinion said:

"The Frisco Railroad, as already stated, is not named in the bill of lading as a connecting or delivering carrier; but, on the contrary, appellant is expressly named as the delivering carrier; its line reaches to the City of Fort Smith and it expressly undertakes to deliver this sugar in good order at its destination. It is bound by the terms of its contract."

The Court erred in the above language, because it was the contract of the Morgan's Louisiana & Texas Railroad & Steamship Company and the St. Louis-San Francisco Railroad was as much a carrier under the terms of that contract as the Missouri Pacific Railroad Company.

It was not necessary to write into the face of the bill of lading, the initials of the delivering carrier. The contract in the bill of lading was to deliver the shipment to destination.

By the opinion of the court in this case, no delivering carrier, other than the initial carrier, would be liable unless it was actually named in the bill of lading. In this case, the Missouri Pacific Railroad Company carried the sugar as far as it could toward the point of final delivery within the city limits of Fort Smith and there, under the published tariff on file with the Interstate Commerce Commission, it turned the exclusive control of the sugar over to the St. Louis-San Francisco Railroad Company, which, for the benefit [fol. 126] of the appellee, transported it to the door of their warehouse. This service was a part of the interstate journey of the sugar and was provided for in the tariffs on file with the Interstate Commerce Commission and the rate for the service was approved by the Interstate Commerce Commission.

This Court in its opinion says:

"The appellant paid the Frisco the sum of $6.30, their switching fee for the service in switching the car to the warehouse of appellee. This switching fee charge was covered by tariff on file with Interstate Commerce Commission."

Therefore, the Court erred in holding that the St. Louis-San Francisco Railroad Company was an agent of the Missouri Pacific Railroad Company and the Frisco Railroad Company "would not be any more liable under this contract than would some transfer company in the City of Fort Smith, whom appellant had employed to deliver the sugar to appellee's warehouse after the car arrived at Fort Smith, its destination."

It is plain that the St. Louis-San Francisco Railroad Company is responsible for the loss of this sugar. To show this we quote from the opinion of the Court:

"The car arrived at Fort Smith on April 19th and on that day it was delivered by appellant to the Frisco Railroad in good order with the seals unbroken. The appellant took a receipt from the Frisco Railroad showing that the car was in good order when delivered to the latter company. When the car was delivered by the latter company to appellee's warehouse, the original seals had been broken and replaced by Frisco seals."

[fol. 127] From this it is very plain that under the facts in this case, the St. Louis-San Francisco Railroad Company is responsible for this loss of sugar. We, therefore, say that the Court erred when it said:

"In other words, if the appelle had sued the Frisco Railroad for this loss, instead of the appellant, the Frisco Railroad would not be liable to the appellee."

We, therefore, ask for a rehearing in this case.

Respectfully submitted, Thomas B. Pryor, Vincent M. Miles, Attorneys for Appellant.

Filed Jany. 7, 1924. W. P. Sadler, Clerk.

[File endorsement omitted.]

[fol. 128] November Term, 1923

(Caption omitted)

ORDER OVERRULING PETITION FOR REHEARING—January 21, 1924

Being fully advised, the petition for rehearing filed herein, is by the Court overruled.

[fol. 129] STATE OF ARKANSAS, ss:

IN THE SUPREME COURT

CLERK'S CERTIFICATE

I, W. P. Sadler, Clerk of the Supreme Court of the State of Arkansas, do hereby, certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case Missouri Pacific Railroad Company, Appellant, vs Reynolds-Davis Grocery Company, Appellee, and also of the opinion of the court rendered therein, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in Little Rock, Arkansas, this 13 day of February, 1924.

W. P. Sadler, Clerk Supreme Court of Arkansas, by J. H. Campbell, Deputy Clerk. (Seal of the Supreme Court, State of Arkansas.)

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1923

No. 891

MISSOURI PACIFIC RAILROAD COMPANY, Petitioner,

vs.

REYNOLDS-DAVIS GROCERY COMPANY

On Petition for Writ of Certiorari to the Supreme Court of the State of Arkansas

On consideration of the petition for a writ of certiorari herein to the Supreme Court of the State of Arkansas, and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

June 9, 1924.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner
vs.
REYNOLDS DAVIS GROCERY COMPANY,
Respondent

No. [redacted]328

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS AND BRIEF IN SUPPORT THEREOF.

THOS. B. PRYOR,
VINCENT M. MILES,
Attorneys for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923

MISSOURI PACIFIC RAILROAD COMPANY, Petitioner		
vs.		No. 891.
REYNOLDS DAVIS GROCERY COMPANY, Respondent		

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The Missouri Pacific Railroad Company, in support of this application for writ of certiorari to the Supreme Court of the State of Arkansas shows:

On the 11th day of May, 1921, the Reynolds-Davis Grocery Company, a wholesale grocery company in Fort Smith, Arkansas, filed suit in the Cir-

cuit Court of Sebastian County, Arkansas, against the Missouri Pacific Railroad Company for the loss of sixty sacks of sugar, weighing 100 pounds each, shipped from Raceland, Louisiana, to the Reynolds-Davis Grocery Company at Fort Smith, Arkansas. In October, 1922, there was a trial before a jury in the Circuit Court of Sebastian County, resulting in a verdict and judgment in favor of Reynolds-Davis Grocery Company against the Missouri Pacific Railroad Company for $992.22, the value of the sixty sacks of sugar.

At the trial it developed that a carload of sugar was shipped in April, 1920, by B. C. Perkins & Company of Raceland, Louisiana, to the Reynolds-Davis Grocery Company in Fort Smith, Arkansas, in car C.C.&O. No. 8109, under seals No. R-660771 and 660772. The shippers loaded the sugar and filled in the bill of lading. The bill of lading was accepted by the railroad company as "Shippers load and count," and the shippers applied the seals to the car. The initial carrier was Morgans Louisiana and Texas Railroad and Steamship Company in Louisiana. The shipment was transported by this line to Texarkana, Arkansas, and by it delivered to the Missouri Pacific Railroad Company. The Missouri Pacific Railroad Company transported the sugar to within the city limits of the City of Fort Smith, Arkansas, and there

delivered it to the St. Louis-San Francisco Railway Company. The original bill of lading was not introduced in evidence, but the receipt, or memorandum, was introduced. This memorandum recited that it was an acknowledgment that a bill of lading had been issued, and recited as follows:

> "Received, subject to the classifications and tariffs in effect on the date of the receipt by the carrier of the property described in the original bill of lading, at Mathews, Louisiana, April 7, 1920, from B. C. Perkins & Co., the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination."

The petitioner's physical line of railroad, so far as this shipment is concerned, extended from Texarkana to within the city limits of Fort Smith. The bill of lading was a shippers order bill of lading, and the Reynolds-Davis Grocery Company purchased it and demanded that the car be placed at the door of its warehouse in Fort Smith. The petitioner, Mis-

souri Pacific Railroad Company, did not have tracks to respondent's warehouse, and the respondent desired that the car of sugar be placed at its warehouse. For this service of moving the car from the line of the petitioner, within the city limits of Fort Smith, over the track of the St. Louis-San Francisco Railway Company to respondent's warehouse, a rate had been approved by the Interstate Commerce Commission, and tariffs were on file showing that rate. The charge for this service was $6.30. The car was transported from Raceland, Louisiana, which was a non-agency station (the bill of lading having been issued at Mathews, Louisiana), to within the city limits of Fort Smith by the Morgan line, and the Missouri Pacific Railroad. At Fort Smith it was delivered to the St. Louis-San Francisco Railway Company, and that railway company received the car from the Missouri Pacific and took entire charge and control of the car, moved it over its own line of railroad with its own locomotive, and placed the car at the warehouse of the Reynolds-Davis Grocery Company. The transfer of control of the car from one carrier to another at Fort Smith was as complete as the transfer at Texarkana, Arkansas, between the Morgan line and the Missouri Pacific Railroad Company. The record discloses that the compensation received by the St. Louis-San Francisco

Railway Company from the shipper for transporting this car over its line was fixed in the published tariff on file with the Interstate Commerce Commission, and that the St. Louis-San Francisco Railway Company and the Missouri Pacific Railroad Company had no authority to arbitrarily fix any rate for this transportation. After the car had been delivered in good condition by the Missouri Pacific Railroad Company to the St. Louis-San Francisco Railway Company, and while the car was in the exclusive control of the St. Louis-San Francisco Railway Company, 6000 pounds of sugar were extracted from it.

There is no dispute in the record but that the loss of the sugar, which is the basis of the judgment, occurred while the car was in the exclusive control of the St. Louis-San Francisco Railway Company.

Under these facts, the trial court held that the St. Louis-San Francisco Railway Company was not a carrier, but was a special agent of the Missouri Pacific Railroad Company, and that the St. Louis-San Francisco Railway Company, although it lost the sugar, was not liable. The trial court entered up judgment against the Missouri Pacific Railroad Company for the sum of $992.22 and interest from April 21, 1920, this being the value of the sixty 100 pound

sacks of sugar, and interest thereon from the date they were lost.

An appeal was taken to the Supreme Court of Arkansas, where the judgment of the lower court was affirmed.

There can be no controversy about the facts in the case. The Supreme Court of Arkansas, in its opinion, said:

> "The car arrived at Fort Smith on April 19th, and on that day it was delivered by appellant (petitioner, Missouri Pacific Railroad Company), to the Frisco Railroad in good order with the seals unbroken. The appellant took a receipt from the Frisco Railroad showing that the car was in good order when delivered to the latter company. When the car was delivered by the latter company to appellee's (respondent, Reynolds-Davis Grocery Company) warehouse, the original seals had been broken and replaced by Frisco seals."

From this it can be seen that there is no controversy as to the fact that the sugar was lost while the car was in the care and custody of the St. Louis-San Francisco Railway Company. The Supreme Court of Arkansas then said:

"The Frisco Railroad, as already stated, is not named in the bill of lading as a connecting or delivering carrier; but, on the contrary, appellant is expressly named as the delivering carrier; its line reaches to the City of Fort Smith and it expressly undertakes to deliver this sugar in good order at its destination. It is bound by the terms of its contract."

The Court further said:

"The appellant (petitioner) paid the Frisco the sum of $6.30, their switching fee for the service in switching the car to the warehouse of appellee, (respondent). This switching fee charge was covered by tariff on file with Interstate Commerce Commission."

The Supreme Court of Arkansas correctly states these facts. The car was safely transported from Raceland, Louisiana, to the city limits of Fort Smith, Arkansas, by the Morgan line and the Missouri Pacific Railroad Company. There, the exclusive control of the sugar was relinquished to the St. Louis-San Francisco Railway Company, for which service the St. Louis-San Francisco Railway Company was paid according to the published tariffs on file with the Interstate Commerce Commission. The Frisco lost the sugar. The Supreme Court of Arkansas then

held that if the appellee had sued that railroad company for the loss of this sugar, it would not have been liable, but held that liability existed only against the Missouri Pacific Railroad Company for the loss of the sugar, although the Court stated in its opinion that the St. Louis-San Francisco Railway company was the company that lost the sugar. It is hard to believe that such was the decision, but we further quote as follows from the language of the Supreme Court of Arkansas, in its opinion, to show that we are correct in that statement:

> "In other words, if the appellee (Reynolds-Davis Grocery Company) had sued the Frisco Railroad for this loss, instead of the appellant (Missouri Pacific Railroad Company), the Frisco Railroad would not be liable to the appellee, for the simple reason that under the contract of shipment, the bill of lading, the Frisco Railroad had not contracted with the appellee to deliver this carload of sugar to the appellee's warehouse in Fort Smith. This was a service, which, under the bill of lading, appellant had contracted with the appellee to perform, and it undertook the performance thereof through its agent, the Frisco Railroad Company."

The Supreme Court of Arkansas committed

error in so holding, because the contract was the contract of the Morgans Louisiana & Texas Railroad and Steamship Company in Louisiana, and the St. Louis-San Francisco Railway Company was as much a carrier under the terms of that contract as the Missouri Pacific Railroad Company. It was not necessary to write into the face of the bill of lading the initials of the delivering carrier. The contract in the bill of lading was to deliver the shipment to destination. By the opinion of the Supreme Court of Arkansas in this case, no delivering carrier other than the initial carrier would be liable unless it was actually named in the bill of lading. In this case the Missouri Pacific Railroad Company carried the sugar as far as it could toward the point of final delivery, within the city limits of Fort Smith, and then, under the published tariff on file with the Interstate Commerce Commission, it turned the exclusive control of the sugar over to the St. Louis-San Francisco Railway, which, for the benefit of respondent, transported it to the door of respondent's warehouse. This service was a part of the interstate journey of the sugar. It was provided for in the tariffs on file with the Interstate Commerce Commission, and the rate for the service was approved by the Interstate Commerce Commission.

It was pressed upon both the trial court and

the Supreme Court of Arkansas that under the Interstate Commerce Act and the Transportation Act of 1920 the St. Louis-San Francisco Railway Company was a carrier, and that under the rules laid down by the Supreme Court of the United States involving interstate shipments the Missouri Pacific Railroad Company was an intermediate carrier, and when the undisputed evidence showed that it had not lost the sugar, there could be no liability against it. These contentions were denied by the Supreme Court of Arkansas.

A petition for rehearing was filed, again stressing the same question, and this was overruled.

Both in the trial court and in the Supreme Court of Arkansas this petitioner contended that under the Acts of Congress regulating commerce and under the tariffs on file with the Interstate Commerce Commission, pursuant to those Acts, the St. Louis-San Francisco Railway Company was the delivering carrier in this case; that it was undisputed that the loss occurred on the line of that railroad company, and that the petitioner, as an intermediate carrier on whose line the loss did not occur, was not liable.

The petition for rehearing was overruled in the Supreme Court of Arkansas and final judgment was entered on the 21st day of January, 1924.

In compliance with the rules of this Court, your petitioner furnishes and herewith attaches as an exhibit to this petition a duly certified copy of the entire transcript of the record in this cause, including the proceedings of the Court to which this writ is asked to be directed.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may issue out of and under the seal of this Court directed to the Supreme Court of Arkansas to command said Court to certify and send to this Court on a date certain, to be therein designated, a full and complete transcript of the record and the proceedings of said Supreme Court in said cause therein entitled "Missouri Pacific Railroad Company v. Reynolds-Davis Grocery Company," and numbered in said Supreme Court 7918, to the end that said cause may be reviewed and determined by this Court as provided by the provisions of the Act of Congress known as the Judicial Code, and by the amendments thereto, including that of September 6, 1916, and that this petitioner may have other and further relief in the premises, as to this Court may seem appropriate, and in conformity with said Act of Congress, and that the judgment of said Supreme Court of Arkansas in said cause, and every part thereof, may be reversed by this Honorable Court.

BRIEF

With reference to this interstate shipment, the decisions of the Supreme Court of the United States, interpreting the Interstate Commerce Act are controlling. Certain declarations of law which control this question have been conclusively settled by the Supreme Court of the United States. They are as follows:

(a) The initial carrier was liable for any loss or damage to the sugar, regardless of where the loss or damage occurred in the course of transportation.

Atlantic Coast Line Ry. Co. v. Riverside Mills, 219 U. S. 186.

(b) Notwithstanding the absolute liability of the initial carrier, under the Interstate Commerce Act, a presumption arises in the absence of proof as to where the loss or damage to the shipment occurred that the delivering carrier was negligent, in a suit against an intermediate or delivering carrier.

Georgia F. A. R.R. Co. v. Blish Milling Co., 241 U. S. 190.

(c) In a suit for loss or damage to freight in

transit, there is no presumption against an intermediate carrier, which is neither the initial nor the delivering carrier, that the loss or damage occurred on its line, and a recovery may be had against an intermediate carrier only upon actual proof that the loss or damage occurred on its line.

Oregon, Washington R. & N. Co. v. McGinn, 258 U. S. 409.

In the last cited case, Mr. Justice Clarke said:

"The settled Federal rule is that, in the absence of statute or special contract, each connecting carrier on a through route is bound only to safely carry over its own line and safely deliver to the next connecting carrier (Myrick v. Michigan C. R. Co., 107 U. S. 102, 107; Michigan C. R. Co. v. Mineral Springs Mfg. Co., 16 Wall. 318, 324); and the liability of a connecting carrier for the safety of property delivered to it for transportation commenced when it is received, and is discharged by its delivery to and acceptance by a succeeding carrier, or its authorized agent (Pratt v. Grand Trunk R. Co., 95 U. S. 43).

"The Cummins Amendment deals with and modifies the common-law liability only of the initial carrier."

The instructions of the trial court, given at the request of the respondent, transgressed these declarations of law laid down by the Supreme Court of the United States. The trial court, in its instructions, told the jury that they should return a verdict for the respondent if they believed that the sugar was lost or damaged while in the hands of either the intermediate carrier, the Missouri Pacific, or the delivering carrier, the St. Louis & San Francisco Railway Company. The trial court seemed to act upon a theory that the Missouri Pacific Railroad Company was the delivering carrier, because it was named in the bill-of-lading as the last carrier. In this the trial court followed a line of decisions to the effect that when a railroad company transports freight to a city and there turns it over to a transfer company or a terminal company and employs that transfer company or terminal company to switch or deliver the freight, the railroad company which brought it to the town and employed the transfer or terminal company, is responsible, and that transfer or terminal company is the agent of the railroad company.

The facts in this case do not justify such a declaration on the part of the Court.

In the case at bar the entire subject of this switching was covered by the tariffs on file with the

Interstate Commerce Commission. The St. Louis-San Francisco Railway Company and the Missouri Pacific Railroad Company had no right to enter into any private contract or agreement with reference to this duty, which was a public duty, provided for by the Act of Congress, and the above decisions of the Supreme Court of the United States are controlling.

We, therefore, respectfully ask that the petition for writ of certiorari be granted, and that the judgment of the Supreme Court of Arkansas be reversed.

Respectfully submitted,

THOS. B. PRYOR,

VINCENT M. MILES,

Attorneys for Petitioner.

INDEX

CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924

MISSOURI PACIFIC RAILROAD COMPANY, Petitioner vs. REYNOLDS-DAVIS GROCERY COMPANY, Respondent.	No. 329.

On Writ of Certiorari to
The Supreme Court of the State of Arkansas

BREIF FOR PETITIONER

STATEMENT

This writ was granted to the Supreme Court of Arkansas to bring up the record in a case where final judgment was entered against the petitioner in favor of the respondent on an interstate shipment of sugar from Raceland, Louisiana, to Fort Smith, Arkansas. The petition for writ of certiorari is as follows:

"TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The Missouri Pacific Railroad Company, in support of this application for writ of certiorari to the Supreme Court of the State of Arkansas shows:

On the 11th day of May, 1921, the Reynolds-Davis Grocery Company, a wholesale grocery company in Fort Smith, Arkansas, filed suit in the Circuit Court of Sebastian County, Arkansas, against the Missouri Pacific Railroad Company for the loss of sixty sacks of sugar, weighing 100 pounds each, shipped from Raceland, Louisiana, to the Reynolds-Davis Crocery Company at Fort Smith, Arkansas. In October, 1922, there was a trial before a jury in the Circuit Court of Sebastian County, resulting in a verdict and judgment in favor of Reynolds-Davis Grocery Company against the Missouri Pacific Railroad Company for $992.22, the value of the sixty sacks of sugar.

At the trial it developed that a carload of sugar was shipped in April, 1920, by B. C. Perkins & Company of Raceland, Louisiana, to the Reynolds-Davis Grocery Company in Fort Smith, Arkansas, in car C. C. & O. No. 8109, under seals No. R-660771 and No. 660772. The shippers loaded

the sugar and filled in the bill of lading. The bill of lading was accepted by the railroad company as 'Shippers load and count,' and the shippers applied the seals to the car. The initial carrier was Morgans Louisiana & Texas Railroad and Steamship Company in Louisiana. The shipment was transported by this line to Texarkana, Arkansas, and by it delivered to the Missouri Pacific Railroad Company. The Missouri Pacific Railroad Company transported the sugar to within the city limits of the City of Fort Smith, Arkansas, and there delivered it to the St. Louis-San Francisco Railway Company. The original bill of lading was not introduced in evidence, but the receipt, or memorandum, was introduced. This memorandum recited that it was an acknowledgment that a bill of lading had been issued, and recited as follows:

'Received, subject to the classifications and tariffs in effect on the date of the receipt by the carrier of the property described in the original bill of lading, at Mathews, Louisiana, April 7, 1920, from B. C. Perkins & Co., the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked consigned and destined as indicated below, which

said company agrees to carry to its usual place of delivery, at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination.'

The petitioner's physical line of railroad, so far as this shipment is concerned, extended from Texarkana to within the city limits of Fort Smith. The bill of lading was a shipper's order bill of lading, and the Reynolds-Davis Grocery Company purchased it and demanded that the car be placed at the door of its warehouse in Fort Smith. The petitioner, Missouri Pacific Railroad Company, did not have tracks to respondent's warehouse, and the respondent desired that the car of sugar be placed at its warehouse. For this service of moving the car from the line of the petitioner, within the city limits of Fort Smith, over the track of the St. Louis-San Francisco Railway Company to respondent's warehouse, a rate had been approved by the Interstate Commerce Commission, and tariffs were on file showing that rate. The charge for this service was $6.30. The car was transported from Raceland, Louisiana, which was a non-agency station (the bill of lading having been issued at Mathews, Louisiana), to within the city limits of Fort Smith by the Morgan line, and the Missouri Pacific Railroad.

At Fort Smith it was delivered to the St. Louis-San Francisco Railway Company, and that railway company received the car from the Missouri Pacific and took entire charge and control of the car, moved it over its own line of railroad with its own locomotive, and placed the car at the warehouse of the Reynolds-Davis Grocery Company. The transfer of control of the car from one carrier to another at Fort Smith was as complete as the transfer at Texarkana, Arkansas, between the Morgan line and the Missouri Pacific Railroad Company. The record discloses that the compensation received by the St. Louis-San Francisco Railway Company from the shipper for transportating this car over its line was fixed in the published tariff on file with the Interstate Commerce Commission, and that the St. Louis-San Francisco Ry. Company and the Missouri Pacific Railroad Company had no authority to arbitrarily fix any rate for this transportation. After the car had been delivered in good condition by the Missouri Pacific Railroad Company to the St. Louis-San Francisco Railway Company, 6000 pounds of sugar were extracted from it.

There is no dispute in the record but that the loss of the sugar, which is the basis of the judgment, occurred while the car was in the exclusive

control of the St. Louis-San Francisco Railway Company.

Under these facts the trial court held that the St. Louis-San Francisco Railway Company was not a carrier, but was a special agent of the Missouri Pacific Railroad Company, and that the St. Louis-San Francisco Railway Company, although it lost the sugar, was not liable. The trial court entered up judgment against the Missouri Pacific Railroad Company for the sum of $992.22 and interest from April 21, 1920, this being the value of the sixty 100 pound sacks of sugar, and interest thereon from the date they were lost.

An appeal was taken to the Supreme Court of Arkansas, where the judgment of the lower court was affirmed.

There can be no controversy about the facts in the case. The Supreme Court of Arkansas, in its opinion, said:

> 'The car arrived at Fort Smith on April 19th, and on that day it was delivered by appellant (petitioner, Missouri Pacific Railroad Company), to the Frisco Railroad in good order with the seals unbroken. The appellant took a receipt from the Frisco Railroad showing that the car was in good order when delivered to

the latter company. When the car was delivered by the latter company to appellee's (respondent, Reynolds-Davis Grocery Company) warehouse, the original seals had been broken and replaced by Frisco seals.'

From this it can be seen that there is no controversy as to the fact that the sugar was lost while the car was in the care and custody of the St. Louis, San Francisco Railway Company. The Supreme Court of Arkansas then said:

'The Frisco Railroad, as already stated, is not named in the bill of lading as a connecting or delivering carrier; but, on the contrary, appellant is expressly named as the delivering carrier; its line reaches to the City of Fort Smith and it expressly undertakes to deliver this sugar in good order at its destination. It is bound by the terms of its contract.'

The Court further said:

'The appellant (petitioner) paid the Frisco the sum of $6.30, their switching fee for the service in switching the car to the warehouse of appellee, (respondent). This switching fee charge was covered by tariff on file with Interstate Commerce Commission.'

The Supreme Court of Arkansas correctly

states these facts. The car was safely transported from Raceland, Louisiana, to the city limits of Fort Smith, Arkansas, by the Morgan line and the Missouri Pacific Railroad Company. There, the exclusive control of the sugar was relinquished to the St. Louis-San Francisco Railway, for which service the St. Louis-San Francisco Railway Company was paid according to the published tariffs on file with the Interstate Commerce Commission. The Frisco lost the sugar. The Supreme Court of Arkansas then held that if the appellee had sued that railroad company for the loss of this sugar, it would not have been liable, but held that liability existed only against the Missouri Pacific Railroad Company for the loss of the sugar, although the Court stated in its opinion that the St. Louis-San Francisco Railway company was the company that lost the sugar. It is hard to believe that such was the decision, but we further quote as follows from the language of the Supreme Court of Arkansas, in its opinion, to show that we are correct in that statement:

> 'In other words, if the appellee (Reynolds-Davis Grocery Company) had sued the Frisco Railroad for this loss, instead of the appellant (Missouri Pacific Railroad Company) the

Frisco Railroad would not be liable to the appellee, for the simple reason that under the contract of shipment, the bill of lading, the Frisco Railroad had not contracted with the appellee to deliver this carload of sugar to the appellee's warehouse in Fort Smith. This was a service, which under the bill of lading, appellant had contracted with the appellee to perform, and it undertook the performance thereof through its agent, the Frisco Railroad Company.'

The Supreme Court of Arkansas committed error in so holding, because the contract was the contract of the Morgans Louisiana & Texas Railroad and Steamship Company in Louisiana, and the St. Louis-San Francisco Railway Company was as much a carrier under the terms of that contract as the Missouri Pacific Railroad Company. It was not necessary to write into the face of the bill of lading the initials of the delivering carrier. The contract in the bill of lading was to deliver the shipment to destination. By the opinion of the Supreme Court of Arkansas in this case, no delivering carrier other than the initial carrier would be liable unless it was actually named in the bill of lading. In this case the Missouri Pacific Railroad Company carried

the sugar as far as it could toward the point of final delivery, within the city limits of Fort Smith and then under the published tariff on file with the Interstate Commerce Commission, it turned the exclusive control of the sugar over to the St. Louis-San Francisco Railway, which, for the benefit of respondent, transported it to the door of respondent's warehouse. This service was a part of the interstate journey of the sugar. It was provided for in the tariffs on file with the Interstate Commerce Commission, and the rate for the service was approved by the Interstate Commerce Commission.

It was pressed upon both the trial court and the Supreme Court of Arkansas that under the Interstate Commerce Act and the Transportation Act of 1920 the St. Louis-San Francisco Railway Company was a carrier, and that under the rules laid down by the Supreme Court of the United States involving interstate shipments the Missouri Pacific Railroad Company was an intermediate carrier and when the undisputed evidence showed that it had not lost the sugar, there could be no liability against it. These contentions were denied by the Supreme Court of Arkansas.

A petition for rehearing was filed, again stressing the same question, and this was overruled.

Both in the trial court and in the Supreme Court of Arkansas this petitioner contended that under the Acts of Congress regulating commerce and under the tariffs on file with the Interstate Commerce Commission, pursuant to those Acts, the St. Louis-San Francisco Railway Company was the delivering carrier in this case; that it was undisputed that the loss occurred on the line of that railroad company, and that the petitioner, as an intermediate carrier, on whose line the loss did not occur, was not liable.

The petition for rehearing was overruled in the Supreme Court of Arkansas and final judgment was entered on the 21st day of January, 1924.

In compliance with the rules of this Court, your petitioner furnishes and herewith attaches as an exhibit to this petition a duly certified copy of the entire transcript of the record in this cause, including the proceedings of the Court to which this writ is asked to be directed.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may issue out of and under the seal of this Court directed to the Supreme Court of Arkansas to command said Court to certify and send to this Court on a date certain, to be therein designated, a full and com-

plete transcript of the record and the proceedings of said Supreme Court in said cause therein entitled 'Missouri Pacific Railroad Company vs. Reynolds-Davis Grocery Company,' and numbered in said Supreme Court 7918, to the end that said cause may be reviewed and determined by this Court as provided by the provisions of the Act of Congress known as the Judicial Code, and by the amendments thereto, including that of September 6, 1916, and that this petitioner may have other and further relief in the premises, as to this Court may seem appropriate, and in conformity with said Act of Congress, and that the judgment of said Supreme Court of Arkansas in said cause, and every part thereof, may be reversed by this Honorable Court."

FEDERAL QUESTION PROPERLY PRESENTED

The petitioner properly raised and relied upon the federal question in the courts below by claiming that its responsibility for the loss of the sugar on an interstate shipment from Raceland, Louisiana, to Fort Smith, Arkansas, depended upon the acts of Congress and applicable principles of common law as interpreted and applied by the federal courts. The question was definitely raised in the trial court. Petitioner introduced evidence that the loss occurred

on the line of the delivering carrier, the St. Louis-San Francisco Ry. Company (R. 36). It further developed in the evidence that the petitioner had no track in the City of Fort Smith, by which cars could be delivered to the Reynolds-Davis Grocery Company, respondent. (R. 8). It developed that the switching rate which was paid to the St. Louis-San Francisco Railway Company for the movement of this car was carried in the Interstate Commerce tariff (R. 9). It further developed by the evidence that when this car was delivered to the St. Louis-San Francisco Railway Company within the city limits of Fort Smith, the latter company took charge of it with its own motive power, moved it over its own rails and that petitioner had no further control over it (R. 9). It objected and properly saved its exceptions to Instruction No. 4 given by the trial court, which declared that the St. Louis-San Francisco Railway Company was the agent of the petitioner. (R. 47). It further requested proper instructions under the rules laid down by the decisions of this Court under the act to regulate commerce with reference to the liability of the connecting carriers (R. 48-49). The question was properly presented in the Supreme Court of Arkansas (R. 54-55). The Supreme Court of Arkansas held that it was an interstate commerce shipment and attempted to apply the rules for such shipments laid down by this court, citing the case of

Oregon-Washington Co., vs. McGinn, 258 U. S. 409, and Georgia F. A. Ry. Co., vs. Blish Milling Co., 240 U. S. 190.

Proper petition for rehearing was presented and the question again pressed upon the Supreme Court of Arkansas. It will, therefore, be seen that the Acts of Congress and applicable principles of common law, as interpreted and applied by the Federal courts, were presented both to the trial court and to the Supreme Court as constituting defenses to which the petitioner was entitled to avail itself.

THE SUPREME COURT OF ARKANSAS ERRED IN HOLDING THAT THE ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY WAS NOT THE DELIVERING CARRIER AND IN HOLDING THAT IT WAS AN AGENT OF THE INTERMEDIATE CARRIER, MISSOURI PACIFIC RAILROAD COMPANY.

The necessary facts are undisputed and most of them are recited correctly in the opinion of the Supreme Court of Arkansas. The shipment was an interstate shipment of freight from a point in Louisiana to the Reynolds-Davis Wholesale Grocery Company in Fort Smith, Arkansas. The initial car-

rier was Morgan's Louisiana & Texas Railroad and Steamship Company. The shipment was delivered to the Missouri Pacific Railroad Company at Texarkana, Arkansas-Texas, and by it delivered to the St. Louis-San Francisco Railway Company at Fort Smith, Arkansas, for final delivery to the consignee. It was held by the trial court and the Supreme Court of Arkansas that the St. Louis-San Francisco Railway Company was an agent of the Missouri Pacific Railroad Company. The Supreme Court of Arkansas erroneously stated that the St. Louis-San Francisco Railway Company did not "share in the distribution of the freight charges."

It is true that the entire charge for the transportation of this shipment from Raceland, Louisiana, to Fort Smith was covered by tariffs on file with the Interstate Commerce Commission. A part of this charge was the amount paid the St. Louis-San Francisco Railway Company for transporting the car from the line of the Missouri Pacific Railroad Company to the warehouse of the respondent. The undisputed testimony of P. W. Furry, who was a witness for respondent, is to the effect that this switching rate is fixed by the Interstate Commerce Commission and was carried in Interstate Commerce tariffs (R. 9). Hence, it was properly a part of the "freight charges" and, therefore, the St. Louis-San

Francisco Railway Company shared in the freight charges.

With reference to an interstate shipment, the decisions of this Court interpreting the Interstate Commerce Act are controlling. Certain declarations of law which control this question have been conclusively settled by this Court. They are as follows:

(a) The initial carrier was liable for any loss or damage to the sugar, regardless of where the loss or damage occurred in the course of transportation.

Atlantic Coast Line Ry. Co. v. Riverside Mills, 219 U. S. 186.

(b) Notwithstanding the absolute liability of the initial carrier, under the Interstate Commerce Act, a presumption arises in the absence of proof as to where the loss or damage to the shipment occurred that the delivering carrier was negligent, in a suit against an intermediate or delivering carrier.

Georgia F. A. R. R. Co. v. Blish Milling Co., 241 U. S. 190.

(c) In a suit for loss or damage to freight in transit, there is no presumption against an

intermediate carrier, which is neither the initial nor the delivering carrier, that the loss or damage occurred on its line, and a recovery may be had against an intermediate carrier only upon actual proof that the loss or damage occurred on its line.

Oregon, Washington R. & N. Co. v. McGinn, 258 U. S. 409.

If we apply these principles, the question resolves itself into whether or not the St. Louis-San Francisco Railway Company in this case was to be treated, as a matter of law, as the agent of the Missouri Pacific Railroad Company or as a separate and distinct carrier.

The Interstate Commerce Commission has power to fix the charges for delivering cars on a private track within the town of Fort Smith, Arkansas. This Court, in speaking of the Terminal Railroad Association of St. Louis in the case of Terminal Railroad Association of St. Louis v. United States of America, decided October 13, 1924, U. S. Sup. Ct. Adv. Op., November 1, 1924, said:

"The Terminal Railroad Association and its subsidiaries are common carriers by railroad and, like the proprietary companies, are subject to regulation by the Commission."

In the case of Grand Trunk Railway v. Michigan Railroad Commission, 231 U. S., 457, this Court, in an opinion by Mr. Justice McKenna, held that Congress has not so taken over the whole subject of terminals, team tracks, switching tracks and sidings of interstate railways as to invalidate state regulations relative to the interchange of traffic.

Up until 1920 Congress had not so taken over the whole subject of terminals, team tracks, switching tracks, and sidings in Fort Smith as to prohibit the Missouri Pacific Railroad Company from arranging by private agreement with the St. Louis-San Francisco Railway Company, whereby the latter company would act as an agent of the Missouri Pacific Railroad Company. However, this Court in the case of United States v. Penna R. R. Co., decided November 17, 1924, U. S. Sup. Ct. Adv. Op. December 15, 1924, upheld the power of the Interstate Commerce Commission to treat movements such as is involved in the case at bar as transportation and to regulate them. In that case, Mr. Justice Brandeis said, with reference to the common use of railroad terminal facilities:

> "Under the Interstate Commerce Act, as amended by the Transportation Act (February 28, 1920), chap. 91, 41 Stat. at L. 456, Comp.

Stat. Sec. 10,071¼, Fed. Stat. Anno. Supp. 1920, p. 72, the Commission might, upon proper findings and conditions, have ordered such extension of tracks, under the powers conferred by Sec. 1, Par. 21, p. 478; or it might have ordered an enlargement of the common use of terminals under Sec. 3, Par. 4, p. 479; or it might have equalized rates and charges for plants within and without the zone by exercise of the power, conferred by Sec. 15, Pars. 3 and 4, pp. 485, 486, to establish through routes and joint rates."

The respondent, Reynolds-Davis Grocery Company, desired a delivery of this car to its warehouse door. The Missouri Pacific Railroad Company had no track whereby this might be accomplished. In the absence of an appropriate order of the law-making power, if it were to be regarded as a purely switching service, the car could not have been delivered to the door of respondent's warehouse without the consent of the St. Louis-San Francisco Railway Company and if, by private treaty on the part of the Missouri Pacific Railroad Company with it, the St. Louis-San Francisco Railway Company had agreed to move this shipment for a sum of money agreed upon to be paid by the Missouri Pacific out of its return for carrying the shipment from Texarkana to Fort Smith, it might properly have been

held to be an agent of the Missouri Pacific Railroad Company, as it was declared by the Supreme Court of Arkansas.

We must look at the facts, however, to see whether or not the act performed by the St. Louis-San Francisco Railway Company was an act of transportation of freight as contemplated by the Interstate Commerce Act as amended by the Transportation Act.

We find that there was a fixed tariff on file and approved by the Interstate Commerce Commission for this charge. The Missouri Pacific Railroad Company relinquished all control over the car. It moved over the rails of the St. Louis-San Francisco Railway Company and was moved by a locomotive of the St. Louis-San Francisco Railway Company. The Missouri Pacific Railroad Company took a receipt for the car in good condition and while it was in the possession of the St. Louis-San Francisco Railway Company and while the latter company was earning the proportion of freight charges allowed it by the Interstate Commerce Commission in the tariff, the sugar was extracted and lost. The Supreme Court of Arkansas, in its opinion, said:

"The Frisco Railroad would not be any more liable under this contract than would some

transfer company in the City of Fort Smith, whom the appellant (Missouri Pacific Railroad Company) had employed to deliver the sugar to the appellee's warehouse after the car arrived at Fort Smith, its destination. In other words, if the appellee had sued the Frisco Railroad for its loss instead of the appellant, the Frisco Railroad would not be liable to the appellees for the simple reason that under the contract of shipment, the bill of lading, the Frisco had not contracted with the appellee to deliver this carload of sugar to appellee's warehouse in Fort Smith."

The Missouri Pacific had not directly contracted with the respondent. It is true that the initials of the Missouri Pacific were written into the routing on the memorandum for the bill of lading. As we interpret the opinion of the Supreme Court of Arkansas, its effect is to hold that if a shipment starts from a point in Louisiana to Fort Smith and the name of the last, or delivering, carrier is not inserted in the routing on the bill of lading, then no suit can be instituted against the carrier that actually delivers the freight. In the bill of lading in this case (R. 28-29), the name of the Missouri Pacific does not appear. The following appears in the routing on the memorandum bill of lading:

"Route: M. L. & T. Alex., Mo. P."

This bill of lading shows it is only a memorandum bill of lading "for use in connection with the standard form of printed bill of lading approved by the Interstate Commerce Commission." There is no showing as to the contents of the formal bill of lading and this memorandum carries only the route, yet the Supreme Court of Arkansas, in its opinion, held that because the initials of petitioner appeared in the route on the bill of lading, the St. Louis-San Francisco Railway Company was its agent. From the strict point of the law of agency, it has always been our understanding that even if the St. Louis-San Francisco Railway Company were an agent of the Missouri Pacific and lost the sugar, then such agent would be liable in an action for conversion of the sugar. However, the Supreme Court of Arkansas held that a peculiar arrangement existed between the St. Louis-San Francisco Railway Company and the Missouri Pacific Railroad Company, under which in no event the St. Louis-San Francisco Railway Company would be liable for the loss of this sugar.

In the case of Grand Trunk Railway v. Michigan Railroad Commission, cited above, Justice McKenna said:

> "And it was remarked that the fact that the freight movement begins and ends within

the limits of a city does not take from it its character of an actual transportation between two termini, the other conditions obtaining We concur in the conclusion of the court."

Congress took over this question by the Interstate Commerce Act as amended by the Transportation Act, Sec. 15, Pars. 3 and 4, pp. 485-6, 41 Stat. at L. Pursuant to this act, the Interstate Commerce Commission approved a tariff fixing the rate that the St. Louis-San Francisco Railway Company might charge for moving this car from the Missouri Pacific Railroad under its own control and with its own locomotive and over its own line of railroad to the door of respondent's warehouse. Prior to the time Congress entered this field, the Missouri Pacific Railroad Company might have made a private contract with the St. Louis-San Francisco Railway Company to move this car and the St. Louis-San Francisco Railway Company might have been the agent of the Missouri Pacific under such a contract. The facts to develop such a supposed situation are not in this record. On the contrary, it is the positive proof that pursuant to the authority granted to the Interstate Commerce Commission, it had entered the field and fixed the charge for this service. The respondent had the right to demand that this car be delivered at the door of its ware-

house in payment of the charges fixed by the Interstate Commerce Commission and the Missouri Pacific had no right to stop the car on a team track and require the respondent to unload its car and haul the sugar to its warehouse by teams or trucks. This situation, therefore, constituted the St. Louis-San Francisco Railway Company the delivering carrier.

The Supreme Court of Arkansas relied upon the following cases to sustain its conclusion that the delivering carrier was an agent of the intermediate carrier, the Missouri Pacific Railroad Company: Western Atlantic Ry. Co. v. Exposition Cotton Mills, (Ga.) 2 L.R.A. 102; 7 S.E. 916; Sapiro v. Boston & Maine Ry. Co., 213 Mass. 70; 99 N.E. 459; St. S.W. Ry. Co. v. A. A. Jackson & Co., 118 459; St. L. & S. W. Ry. Co. v A. A. Jackson & Co., 118 Fed., 623.

An examination of these cases discloses that the facts in each particular case justified the Court in finding that the instrumentality, which actually delivered the freight, was in truth an agent acting for a principal. The difference is that in the case at bar, the St. Louis-San Francisco Railway Company was performing a service as a common carrier under a tariff approved by the Interstate Com-

merce Commission, pursuant to authority granted it by an act of Congress.

Respectfully submitted,

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Attorneys for Respondent

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CITATIONS

NO. 329

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

MISSOURI PACIFIC RAILROAD COMPANY,
PETITIONER

vs.

REYNOLDS-DAVIS GROCERY COMPANY,
RESPONDENT

BRIEF FOR RESPONDENT

STATEMENT

The car of sugar in question was shipped from Raceland, Louisiana, under bill of lading dated April 7, 1920, issued by Morgan's Louisiana & Texas Railroad & Steamship Company. The route designated in the bill of lading shows the Petitioner, the Missouri Pacific Railroad Company, as the delivering or terminal carrier (R. 28) The consignment was made to shipper, Fort Smith, Arkansas, notify Reynolds-Davis Grocery Company (Respondent) (R. 29.) Petitioner received the car from the initial carrier, transported it to within the city limits of Fort Smith over its own lines and, through a "switching arrangement" with the St. Louis & San Francisco Railway Company (hereinafter called Frisco), delivered it at the warehouse of Respondent (R. 8.)

The Frisco did not handle the car under the bill of lading. It knew nothing about any bill of lading. It did not share in the distribution of the freight charges. It merely handled the car as a switchman and was paid a switching fee by

Petitioner (R. 8.) Petitioner took up the bill of lading from Respondent and collected the entire freight charges (R. 25-26.) The Frisco had nothing to do with either. With these facts before it, absolutely undisputed, the trial court, in effect, held that Petitioner was the terminal or delivering carrier insofar as the Common Law presumption of place of loss is concerned, and the Supreme Court of Arkansas upheld this view.

Thereore, if Petitioner has, in apt time and proper manner, presented a question that gives this Court jurisdiction of this cause (which we do not concede,) that question is:

Is the Interstate Commerce Act, as amended by the Transportation Act, to be construed as defining which railroad shall be deemed the terminal carrier in an interstate shipment?

EVEN IF A FEDERAL QUESTION EXISTS IT WAS NOT PROPERLY PRESENTED

There is not the slightest suggestion of a Federal question in the pleadings. The complaint (R. 1) makes the usual allegations of failure to deliver, and the answer (R. 4) is made up of a series of specific denials. At the trial of the cause the only testimony which might even remotely suggest a Federal question was that of P. W. Furry, the Frisco's General Agent in Fort Smith, who testified as follows: (R. 9)

Q "Switching rates for this switching is fixed by the Interstate Commerce Commission?

A "It is carried in the interstate commerce tariffs."

It is apparent from the record that this was merely an incident in the trial. Petitioner did not rely on this defense but relied on the defense that the loss occurred prior to the delivery of the car to Petitioner. Petitioner introduced two witnesses by whom it attempted to prove that the goods were never even delivered to the initial carrier, or that they were extracted from the car while the car was in the custody of the initial carrier (R. 42-43.) This was the defense relied upon. It was submitted by the court in

instruction No. 4 given at Petitioner's request (R. 49.) It is true that in instructions Nos. 2 and 3 (R. 48-49,) requested by Petitioner it, in effect, asked the trial court to hold that Petitioner was an intermediate carrier; but in the absence of an affirmative pointing out of the Federal Statute under which such defense was set up, the trial court presumed that the claim was asserted under the State Law.

Miller vs. Cornwall R. Co., 168 U. S., 131.

Therefore, the question was not at any time or in any manner presented to the trial court. It has been consistently held by this Court that the Federal right, title, privilege or immunity must be set up or claimed in the trial court when under the State practice the highest State Court, in reviewing the judgments of the trial court, refuses to consider questions not therein raised.

Baldwin vs. Kansas, 129 U. S., 52.
Spies vs. Illinois, 123 U. S. 131.
Brook vs. Missouri, 124 U. S., 394.
Morrison vs. Watson, 154 U. S., 111.
Layton vs. Missouri, 187 U. S. 356.

Therefore, it was necessary to set up the Federal question in the trial court, for under the Arkansas practice the Supreme Court will consider only such questions as were raised below.

Hanson vs. Anderson, 91 Ark., 443.

Even if we leave out of consideration the necessity of so presenting the question to the trial court as to enable that court to pass on it, Petitioner has not set up or claimed its supposed right under a Federal Statute with sufficient definiteness and particularity to give this Court jurisdiction under the numerous applicable decisions of this Court.

F. G. Oxley Stave Co., vs. Butler Co., 166 U. S., 648.
Michigan Sugar Company vs. Michigan, 185 U. S., 112.
Chicago & N. W. R. Co. vs. Chicago, 164 U. S., 454.
Johnson vs. New York L. Ins. Co., 187 U. S., 491.

THE SUPREME COURT OF ARKANSAS DECIDED ONE QUESTION AND ONLY ONE, VIZ: THAT PETITIONER'S LIABILITY WAS THAT IMPOSED BY THE

COMMON LAW ON A TERMINAL OR DELIVERING CARRIER, AND ITS DECISION IS CORRECT.

The Supreme Court of Arkansas did not decide as a fact (as asserted by Petitioner, its brief (p. 8), that the Frisco lost the sugar. That question was not before it. In its Statement of facts, the court merely said, (R. 54-55): "The car arrived at Fort Smith on April 19th and was delivered by the appellant (Petitioner) to the Frisco Railroad in good order, with the seals unbroken. The appellant (Petitioner) took a receipt from the Frisco showing that the car was in good order when delivered to the latter company." The testimony on which this statement of the Supreme Court of Arkansas is based, is that Petitioner placed the car on the Frisco connection with the original seals intact, and that the actual interchange or delivery of the car to the Frisco took place several hours later. The testimony was sufficient to enable the jury to determine, if that had been necessary, that the loss occurred after the car was set on the Frisco connection but before actual delivery had been made to the Frisco (R. 14, 16, 17, 19, 20, 45.) This Court will not be concluded by the mere language used by the Supreme Court of Arkansas, but the real substance and effect of its decision will be inquired into and determined.

McCullough vs. Virginia, 172 U. S., 102.

Neither did the Supreme Court of Arkansas decide that there was no possible liability of any kind attaching to the Frisco, as asserted by counsel (Petitioner's brief, p. 22.) The Frisco was not a party and the question of its liability was not before the court. The court merely decided that the Common Law presumption as to place of loss applied to Petitioner and not to the Frisco under the facts presented.

It will be noted that the Supreme Court of Arkansas did not base its decision solely on the language of the bill of lading but also took into consideration what was done under the bill of lading. In its statement of facts, the Supreme Court of Arkansas said: (R. 54.)

> "The Frisco did not handle the car under the bill of lading and did not share in the distribution of the freight charges. The appellant paid the Frisco the

sum of $6.30, its switching fee, for the service in switching the car to the warehouse of the appellee."

and in its opinion said: (R. 55-56.)

"The Frisco Railroad Co., was not named in this bill of lading as a connecting carrier and the services it performed in the premises under its switching arrangements with the appellant were not as a connecting carrier, but purely and simply at the instance, and as the agent, of appellant. The terms of the bill of lading control here."

and cited the following cases to sustain its conclusion:

Western & Atlantic Railroad Company vs. Exposition Cotton Mills (Ga.), 2 L. R. A., 102; 7 S. E., 916.

Shapiro vs. Boston & Maine Railroad, 213 Mass., 70; 99 N. E., 459.

St. Louis & Southwestern Railway Co., vs. Jackson & Company, (Tex.), 118 S. W., 853.

Atlantic National Bank vs. Southern Railway Company, 106 Federal, 623.

Every one of the above cases is directly in point. The facts are practically identical with the facts here. In every instance an interstate shipment was involved. In every instance the switching facilities made use of were apparently a part of a general railroad system engaged in interstate transportation. After a careful search we have been unable to find a single case wherein a contrary conclusion has been reached. Other cases supporting this conclusion are:

Central Ry. vs. Jones, 7 Ga. App. 165; 66 S. E., 492.

Kentucky Bridge Co. vs. Louisville, etc., Ry. 37 Fed., 567.

Fasy vs. International Nav. Co., (N. Y.), 77 App. Div. 469 79 N. Y. S., 1103 (Affirmed without opinion, 177 N. Y. 591; 70 N. E., 1098.)

It would seem that this precise question has not been decided by this Court in terms. However, this Court has definitely held that in an interstate shipment the bill of lading is controlling, and has defined the term "terminal carrier" to mean the last connecting carrier operating

under the bill of lading. Strangely enough, two cases so holding are cited for other purposes in Petitioner's brief.

Georgia F. A. R. R. Co. vs. Blish Milling Co., 241 U. S., 190.

Oregon, Washington & R. and N. Co. vs. McGinn, 258 U. S., 409.

In the Blish case this Court, speaking through Mr. Justice Hughes, said:

> "The connecting carrier is not relieved from liability by the Carmack (Cummins) Amendment, but the bill of lading required to be issued by the initial carrier upon an interstate shipment governs the entire transportation, and thus fixes the obligations of all participating carriers to the extent that the terms of the bill of lading are applicable and valid."

Later on in this opinion the Court used this language:

> "As we have said, the latter (terminal carrier) takes the goods under the bill of lading issued by the initial carrier, and its obligations are measured by its terms; (citing cases) and if the clause must be deemed to cover a case of misdelivery when the action is brought against the initial carrier, it must equally have that effect in the case of the terminal carrier, which, in the contemplation of the parties, was to make the delivery."

In the McGinn case the Court, speaking through Mr. Justice Clark, reiterated and quoted the language used in the Blish case set out above.

It will thus be seen that in each of these cases, this Court has classified as the terminal carrier the *last connecting carrier operating under the bill of lading.* These cases recognize and give effect to the right of the original parties to the contract of shipment to designate the carrier that is to make the delivery. Certainly it cannot be successfully contended by Petitioner that the language used by Mr. Justice Hughes in the Blish case and quoted by Mr. Justice Clark in the McGinn case, viz: *"the terminal carrier, which, in the contemplation of the parties, was to make the delivery,"* has no meaning. In the case at bar, the parties

to the contract designated Petitioner as the terminal carrier. Petitioner was the carrier which "in the contemplation of the parties was to make the delivery." Petitioner recognized this obligation at the time the delivery was made. Petitioner and not Respondent selected the instrumentality for switching the car to Respondent's warehouse. Petitioner took up the bill of lading from the Respondent and collected the entire freight bill. It performed without question or hesitation all those duties which, per force, devolve upon a terminal carrier. We cannot see any consistency between the attitude asumed by Petitioner at the time this delivery was being made and the attitude it assumes now.

THERE IS NO FEDERAL QUESTION INVOLVED

Petitioner apparently concedes (Petitioner's brief, pp. 19-23) that in the absence of intervention by Congress in such a manner as to change the situation, this case would be governed by the contract between shipper and carrier, and that the liability of the connecting carrier would be that imposed by the Common Law. However, Petitioner argues that Congress has intervened, and for support points to the Interstate Commerce Act, as amended by the Transportation Act, Section 15, Paragraph 3 and 4, pages 485 and 486, 41 Stat. at L. These paragraphs merely confer authority upon the Interstate Commerce Commission, on conditions therein specified, to establish through routes, joint classifications and joint rates or charges. From this it is argued since the Frisco switched the car for Petitioner to Respondent's warehouse and was paid by Petitioner a switching fee for its service, the amount of which is carried in a tariff on file with the Interstate Commerce Commission, that a joint rate had been fixed, and, having been so fixed, the switchman became the delivering carrier without reference to the terms of the bill of lading, and in total disregard of the fact that the switchman did not take under the bill of lading, or have any connection with it, or perform any duty or exercise any authority under it. There is nothing in this record to show that the Interstate Commerce Commission had fixed a through route or a joint rate or charge which involved or included the switching charge of the Frisco. There is nothing in the record from which it can even be inferred that Petitioner was compelled to deliver

the car to Respondent's warehouse, or that it was compelled to deliver it by means of the Frisco switching facilities, or that the two carriers were prevented by any action or order of the Interstate Commerce Commission from entering into a private contract for the switching of this car. The entire record on this point may be abstracted thus:

(a) The initial carrier issued a bill of lading, by the terms of which it undertook to deliver the car to Respondent through Petitioner as the terminal carrier (R. 28-29.)

(b) Petitioner received the car from the initial carrier and brought it into the city limits of Fort Smith. After it had been switched to Respondent's warehouse by the Frisco, Petitioner called on the Respondent, took up the bill of lading, collected the entire freight charge and paid the Frisco a switching fee (R. 8, 25-26.)

(c) The amount of such switching fee is carried in tariffs on file with the Interstate Commerce Commission (R. 9.)

Therefore, even if the statute relied upon by Petitioner could be construed as giving the Interstate Commerce Commission power to convert a switchman into a terminal carrier by directing the route and the method of delivery and the rate to be charged, still Petitioner's argument must fall for the simple reason that it is nowhere shown that this power was exercised.

But the statute will bear no such construction. Under the Interstate Commerce Act, as amended by the Transportation Act, the Interstate Commerce Commission has just such powers and authority as have been specifically conferred upon it by Congress and no more. It may be conceded that Congress has the power to define which railroad shall be deemed the terminal carrier in an interstate shipment and to fix its liability but this can only be accomplished by a positive and plenary statute. In the case of the initial carrier this has already been accomplished by the Carmack and Cummins Amendments. As to connecting carriers, including terminal carriers, Congress has not acted. In this case the Supreme Court of Arkansas has defined a terminal carrier as the last connecting carrier operating

under the bill of lading; and Congress not having acted upon the subject, we respectfully submit that this cause does not present a question for review by this Court.

Respectfully submitted,

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HARRY P. DAILY
JOHN P. WOODS
Attorneys for Respondent

Messrs. Joseph M. Hill, Harry P. Daily, and *John P. Woods,* for respondent.

Mr. Justice Brandeis delivered the opinion of the Court.

This action was brought in a state court of Arkansas by Reynolds-Davis Grocery Company against the Missouri Pacific Railroad to recover for the loss of part of a carload of sugar shipped from Raceland, Louisiana, to Fort Smith, Arkansas, on a through bill of lading. The loss occurred within the city of Fort Smith while the car was in the possession of the Saint Louis-San Francisco Railroad. This carrier had been employed by the Missouri Pacific to switch the car from a point on its lines within the city to the consignee's warehouse, which lay within the city on the lines of the switching carrier. The Missouri Pacific, relying upon *Oregon-Washington Railroad & Navigation Co.* v. *McGinn,* 258 U. S. 409, requested the trial court to rule that, as the bill of lading provided that no connecting carrier should be liable for any damage which did not occur on its own lines, and delivery at the consignee's warehouse was part of an interstate shipment, the defendant was not liable, because it was neither the initial nor the delivering carrier. The court refused to rule as requested; the jury found for the plaintiff; and the judgment entered on the verdict was affirmed by the Supreme Court of Arkansas. 161 Ark. 579. This Court granted a writ of certiorari. 265 U. S. 577.

The joint through rate covered delivery at the warehouse of the consignee. The bill of lading named Morgan's Louisiana & Texas Railroad and Steamship Company as the initial carrier and the route designated therein named the Missouri Pacific as the last of the connecting carriers. Its lines enter Fort Smith but do not extend to the consignee's warehouse. It employed the

Saint Louis-San Francisco to perform the necessary switching service. And it paid therefor $6.30, the charge fixed by the tariff on file with the Interstate Commerce Commission. The switching carrier was not named in the bill of lading and did not receive any part of the joint through rate. It was simply the agent of the Missouri Pacific for the purpose of delivery. The Missouri Pacific was the delivering carrier and is liable as such.

Affirmed.